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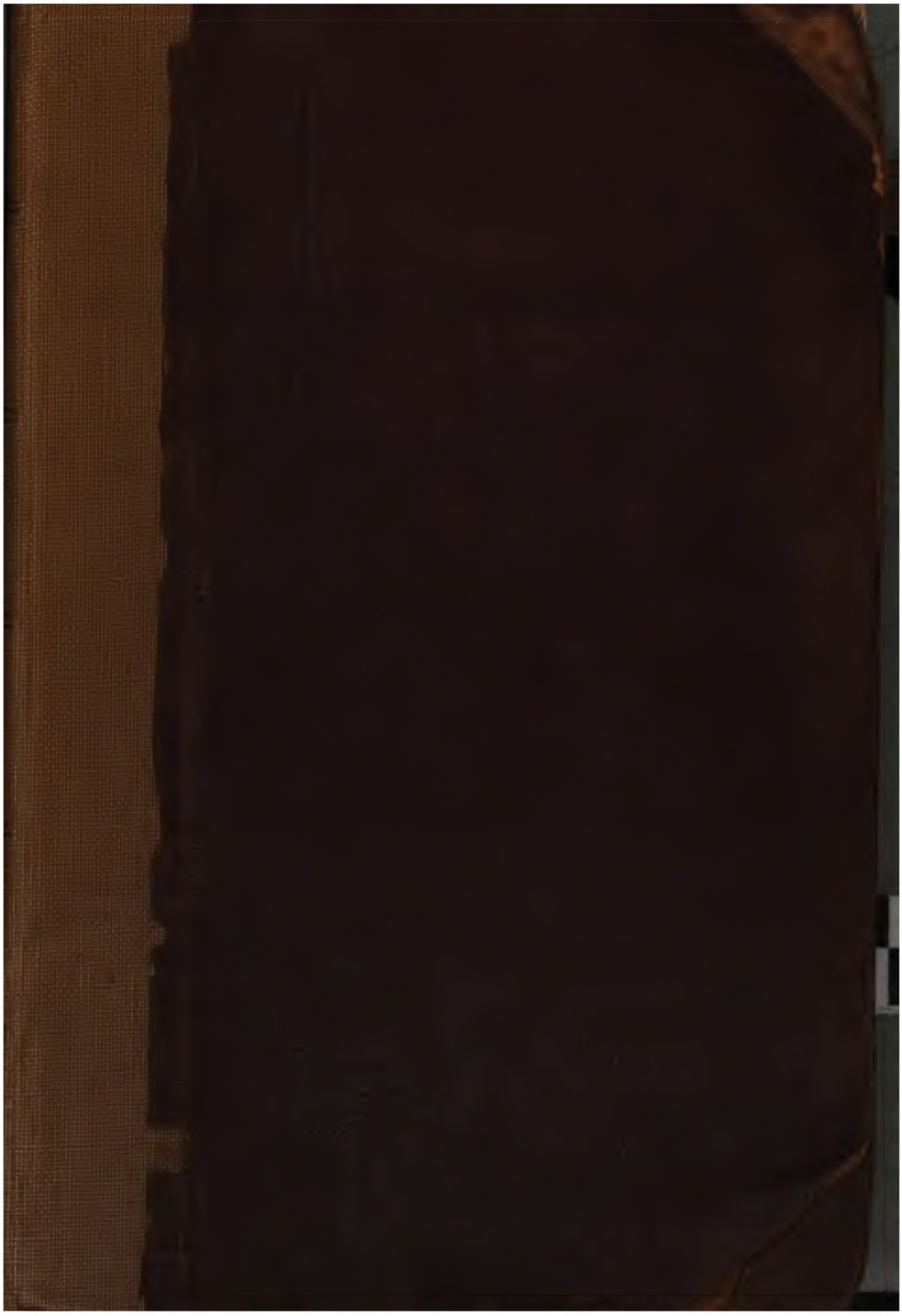

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OF LEGAL AND SOCIAL HISTORY

Robert J. Whitwell.

KENDAL.

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REPORTS

OF

CASES ADJUDGED

IN

The Court of King's Bench,

DURING

THE REIGNS OF

CHARLES THE SECOND; JAMES THE SECOND; AND WILLIAM THE THIRD.

BY

SIR BARTHOLOMEW SHOWER, KNT.

IN

TWO VOLUMES.

VOLUME THE SECOND:

CONTAINING,

Cases and Special Arguments in the Court of King's Bench,

Beginning in Easter Term, in the Thirtieth Year of CHARLES THE SECOND; and ending in Easter Term, in the Third Year of JAMES THE SECOND:

With Two complete TABLES;

One of the *Names of the Cases*; the other of the *Principal Matters*.

THE SECOND EDITION,

CORRECTED,

WITH NOTES AND MARGINAL REFERENCES.

BY

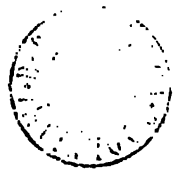
THOMAS LEACH, ESQ.

OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

London:

PRINTED FOR W. CLARKE AND SON, PORTUGAL-STREET, LINCOLN'S-INN.

1794.



TO THE

READER.

IN all Prefaces to Books publiſhed after the Author's deceaſe, two things more eſpecially ſeem neceſſary. FIRST, To render ſome account of the Author; and SECONDLY, of the Work itſelf. I confeſs the former ſeems needleſs at this time, not only from what has been already ſaid on that ſubject in the Preface to the *other Volume of theſe Reports*, but likewiſe, and more effectually, from that eſtabliſhed character and reputation our *Author* acquired with all who knew him; of which many eminent perſons are ſtill living, and ready to atteſt. *Vide Seld. Epiſt. ad Hengham.*

As to the Work itſelf, it is evident from ſeveral parts of the original manuſcript, which ſtill remain in the publiſhers hands, that the ſame was not only collected and tranſcribed by SIR BARTHOLOMEW SHOWER's own direction, but it was in many places corrected with his own hand; and it is certain, that he himſelf would have finiſhed and corrected it from the preſs, had not death prevented him.

IT is very obſervable, that our Author appears to have been more than ordinary careful to inſert in this part of his collection, not only ſuch caſes and arguments as relate to PLEAS OF THE CROWN, and *Criminal Matters*, but likewiſe all ſuch ſpe- *See the Table, tit.* Indictments, &c.

cial precedents and pleadings as concern thoſe matters; and the reaſon hereof he himſelf declares; *viz.* for preſerving the ſeveral forms of thoſe precedents.

AND hence it is you have divers forms of indictments, informations, inquiſitions, convictions, orders of ſeſſions, and the like; ſeveral whereof, I may juſtly affirm, are not to be met with in any other Book of the Law. And this alone might ſufficiently recommend the Work, eſpecially ſeeing it has been long ſince obſerved by my LORD COKE, "That *there is no knowledge, "caſe, or point of law, ſeem it of never ſo little "account, but will ſtand a ſtudent and profeſſor of "the law in ſtead at one time or other; and there-"fore in reading, nothing is to be pretermitted.*"

Co. Lit. 9. *a.*

I SHALL add no more touching the Work or the Author, but only conclude with this advice to the Reader: that ſome few miſtakes in the orthography of the Names of the Caſes may be eaſily corrected by the enſuing table.

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Eaſter Term,

The Thirtieth of Charles the Second,

IN

THE KING's BENCH.

Sir WILLIAM SCROGGS, *Knt. Chief Juſtice.*

Sir THOMAS TWISDEN, *Knt.*
Sir WILLIAM WYLDE, *Knt.* } *Juſtices.*
Sir THOMAS JONES, *Knt.*

Sir WILLIAM JONES, *Knt. Attorney General.*

Sir FRANCIS WINNINGTON, *Knt. Solicitor General.*

The King *againſt* Johnſon.

Caſe 1.

Agreeing to give a perſon a ſum of money to prove a deed to be forged, for the purpoſe of obtaining a verdict, is a criminal offence.

INFORMATION againſt the defendant, for that at a trial at law a deed was produced by *Lady Ivy*, againſt *Dr. Whitchcott's lady* and her tenants, which though the defendant denied it to be true, yet the jury ſo much relied on it as thereupon to give a verdict for the plaintiff; whereupon the defendant agreed with another perſon to give him three hundred and fifty pounds, to prove that the ſaid deed was forged; and of this agreement he is found guilty.

7 Mod. 101. 1 Hawk. P. C. ch. 69. ſ. 10.

An information for *attempting* to ſuborn a perſon to prove a deed *falſe*, is good, without alledging that the deed was *true*.

MR. POLLEXFEN moved in arreſt of judgment, ſaying, FIRST, *Johnſon* is found guilty of no crime, for the information does not ſurmiſe or alledge that the deed was true. (*a*)—This they dared not do; for then they muſt have proved it again, and ventured another trial, which they were afraid to do.

(*a*) See Rex v. Hinton and Brown, 3 Mod. 122. Style v. Heape, Yelv. 72. Harris v. Dixon, Cro. Jac. 158. Anonymous. Cro. Car. 337.

Agreeing to prove a deed forged, is indictable if done with an unlawful intent.

SECONDLY, It is found that they have agreed to prove the deed forged; now proving a deed to be forged is lawful, and therefore it is no crime to agree to prove it forged; for any man may agree with another to give him money to do a lawful act, as to prove a deed to be forged; and this is really ſo, but he could not elſe prove it. (*b*)

Forgery of a *certain writing* is good.

THIRDLY, That in the information they do not ſo much as ſay it was *factum*, but only *quoddam ſcriptum*. (*c*)

An indictment that one man gave another *diverſas denariorum ſummas*, to prove a deed to be forged, is ſufficiently certain.

FOURTHLY, It is ſaid, that he gave *diverſas denariorum ſummas*, which * I think is too uncertain; for *informations* are of the ſame nature with *indictments*, and both theſe muſt be certain. In *Lambard*, (*d*) in *Fitzherbert*, (*e*) in *Roll.* (*f*) in *Croke*, (*g*) and in many more caſes, the words *diverſa*, &c. have been adjudged too general: (*b*) now the giving theſe ſums of money is the only thing he is charged with, and found guilty of, and yet *non liquet*, what the ſums were.

* [2]

An indictment for *agreeing* to ſuborn a man to commit perjury is good, without *averring* the agreement ſpecially.

FIFTHLY, It is ſaid three hundred and fifty pounds were put in a cheſt to be paid upon, &c. according to the agreement, and do not ſay there was any ſuch agreement. (*i*)

If money be depoſited on an agreement to do an act, the agreement ſhall be intended made where the money is depoſited.

SIXTHLY, Then ſuppoſe there was ſuch an agreement, here is no *place* alledged where ſuch agreement was made, and therefore there could be no *venire facias* for its trial; for the place of keeping the money is not material. (*k*)

Diſtringas.

SEVENTHLY, In the *diſtringas* one is named *Bartholomew Perryman*, and in the panel it is *Ferryman*; which is error: for there are but twenty-three returned. (*l*)

Conſpiracy need not be ſtated in an indictment for doing an unlawful act by agreement.

EIGHTHLY, It was ſaid by MR. WILLIAMS, that in this caſe they do not ſo much as ſuggeſt a conſpiracy in their information. (*m*)

Words of *inducement* in an indictment need not be proved; *ſed aliter* of words, which conſtitute the offence.

NINTHLY, In Trinity Term following, MR. POLLEXFEN moved

(*b*) Wherever all the facts charged in an indictment may be true, and yet the party be innocent, ſuch indictment is inſufficient, Dougl. 153.

(*c*) An indictment on 5 Eliz. c. 14. for forging *quoddam ſcriptum obligatorium* is good, although it do not ſay, purporting to be a *writing obligatory*, Reg v. King, 1 Salk. 342. See alſo Reg v. Goddard, 3 Salk. 871. 2 Ld. Ray. 920.

(*d*) Lamb. Inſt. 456.

(*e*) Fitz. Abr. "Indictment" 10.

(*f*) 1 Roll. Abr. 89.

(*g*) Cro. Car. 381.

(*b*) See 4 Co. 41. 5 Co. 121. 1 Show. 389. 1 Stra. 497. 2 Stra. 849. 900. 1248. 2 Hawk. P. C. c. 25. ſ. 74.

(*i*) 1 Salk. 371. 380. Mod. Ca. 32. Skin. 343. 2 Ld. Ray. 1363.

(*k*) See the caſe of Blackbourn v. Conſet, 2 Mod. 304.

(*l*) 1 Roll Abr. 198. 2 Roll Rep. 168.

(*m*) It is not neceſſary that any *overt act* of conſpiring ſhould be laid in an indictment for a conſpiracy, Stra. 193. See alſo 2 Burr. 999. 3 Burr. 1321.

the

the ſame exceptions as he did before (RAINSFORD *Chief Juſtice* being then removed, and SCROGGS made *Chief Juſtice*) adding further, that if it were no crime, the verdict finding the fact done *malitioſe*, with the other uſual adverbs, will make it no more ſo than if thoſe words had been omitted, as it was adjudged in *Barnadiſton's caſe* (*n*) in the Exchequer Chamber about the double return.

But TENTHLY, the main matter they inſiſted upon was that there was no *time* nor *place* alledged in the information when and where the articles of agreement were made. (*o*)

MAYNARD *Serjeant e contra*, moved, that the *place* is not material becauſe it is not traverſable, &c.

MR. SOLICITOR, likewiſe for the king, ſaid, as for *diverſas pecuniæ ſummas* it is ſo far from being ill, and that were it to lay again, the king's counſel would make it the ſame; for a *particular certainty* (*p*) would have been almoſt impoſſible for the king to prove, becauſe theſe things are always tranſacted in ſecret.

* MR. FINCH urged, that the agreement cannot be preſumed to be made any where elſe than where the money was depoſited, and it is all but one act and one entire offence. * [*3]

SIR WILLIAM JONES ran over all the exceptions, and then urged.

FIRST, That to give a juryman money after he is returned is a good cauſe of challenge; nay, ſuppoſe you know he will be returned, if you give him a great ſum of money to go according to his conſcience, it is unlawful.

SECONDLY, As for the adverbs, though it do not make a lawful thing a crime, yet if it be indifferent it will make it faulty, and are of great ſignification ſurely to aggravate, if not to make a fault. (*q*)

(*n*) Sir Samuel Barnadiſton's caſe, 3 State Trials, 939. and ſee Rex v. Taylor, 1 Show. 185. 2 Leon. 211. 214. 3 Leon. 23c. Hetley 12. Cro. Eliz. 105. 147. Savil 43. 3 Bac. Abr. 817. 1 Hawk. P. C. ch. 69. ſ. 17. Caſes in Crown Law, 2 edit. 65. 391.

(*o*) See Dyer. 68. that the time and place ought to be repeated to every material fact, or reference made to them, 1 Roll. Rep. 223. but if the fact be circumſtantial only, the time and place need not be mentioned, March. pl. 127. But in an indictment of perjury, there muſt be an allegation of *time* and *place*, which are ſometimes neceſſary to be laid with preciſion, and ſometimes not. Rex v. Aylet, 1 Term Rep. 69. See alſo Drewry v. Twiſs, 4 Term Rep. 558. Frith v. Gray, 4 Term Rep. 561. Pope v. Foſter, 4 Term Rep. 590.

(*p*) That certainty to a *certain Intent in general*, is ſufficient in a charge or accuſation. See Rex. v. Herne, Cowp. 682. Rex v. Lyme Regis, Dougl. 159. See alſo, 5 Co. 121. a. Co. Lit. 303.

(*q*) Sir S. Barnardiſton was tried at Guildhall, on 14 February, 36 Car. 2. on an information for a conſpiracy to ſubvert the government. The information charged the offence to have been "falſely, ſeditiouſly, maliciouſly, and factiouſly," committed. It was contended that proof ought to be given of theſe circumſtances: but the Chief Juſtice over-ruled the objection, becauſe where the nature of the thing neceſſarily imports malice, &c. there needs no proof but of the fact done, and the law ſupplies the reſt; but if the fact be indifferent in itſelf, then to make it a crime, the accidental circumſtances muſt be proved. 3 State Trials, Mr Hargrave's edition, 939. See the Information, Trem. P. C. 55.

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THIRDLY, *Diverſas ſummas, &c.* I take it to be good enough, and with this diſtinction, where the certainty and quantity (if known) will greaten or leſſen the fault or fine; but we are upon a fault where the particular ſum is not material, as in caſe of *ſimony* or *perjury*.

SCROGGS *Chief Juſtice* ſaid, he thought it an offence, and a great one.

TWISDEN *Juſtice.* As to the agreement, you cannot traverſe that ſingly, but altogether by pleading *not guilty*; as for the offence, I judge it great.

WYLDE *Juſtice.* It is a great offence, for no witneſſes are to have money given them; and for the *diverſas, &c.* the caſes MR. POLLEXFEN cited are adjudged naught for another reaſon, as that of *diverſa cottagia*, (*r*) becauſe the number is neceſſary to be known, the ſtatute ſetting a certain penalty upon every houſe; and ſo for the ſtraw, (*s*) the puniſhment is meaſured according to the quantity, (*t*) and therefore naught becauſe uncertain; here it is not ſo.

JONES *Juſtice.* I judge it an offence, for witneſſes ought to come unbiaſſed and not affected with money; but he thought there was *a miſtrial*, and the information imperfect, no *place* being laid where the agreement was made.

But three of the judges to one gave judgment for THE KING.

When a perſon convicted of a miſdemeanour is brought up for judgment, affidavits may be read in *aggravation* and in *mitigation* of the puniſhment.

MAYNARD *Serjeant*, ſome few days after this, moved to have the fine ſet, and *Johnſon* called, who appeared and deſired his affidavits might be read to *extenuate* the offence, (*u*) after which, and counſel heard on both ſides, one aggravating, the other leſſening * the crime, there was an interlocution amongſt the judges.

* [4]

(*r*) 1 Show. 389.

(*s*) This caſe was an indictment for engroſſing *magnam quantitatem ſtraminis et feni*, and held ill for uncertainty, for it ought to have mentioned how many loads of hay and how many of ſtraw. Anonymous. Cro. Car. 381. See alſo Rex v. Gibbs, 1 Stra. 497.

(*t*) See 1 Lev. 203.

(*u*) When a defendant who has been convicted on an indictment, comes up to receive judgment, *the proſecutor* may read affidavits in aggravation, though made by witneſſes, who were examined at the trial, which affidavits *the defendant* is at liberty to anſwer. Rex v. Sharpneſs, 1 Term Rep. 228. And the acts of a defendant between the trial and the ſentence may be diſcloſed by affidavits, either in extenuation or in aggravation of his offence, even although thoſe acts form ſeparate and diſtinct offences; but the Court in ſuch caſe will not inflict a higher puniſhment than the nature of the charge, of which the defendant is convicted, warrants. Rex v. Withers, 3 Term Rep. 428. Rex v. Walter, 3 Term Rep. 432. So where a defendant in a criminal proſecution, who has ſuffered judgment to go by default, is brought up for judgment, each ſide may, by affidavit, diſcloſe his own caſe; and if any further explanation ſhould appear to be neceſſary, the Court will ſuſpend the judgment, to afford the defendant an opportunity to furniſh it. Rex v. Wilſon, 4 Term Rep. 487; and if the defendant in ſuch caſe has made declaration confirming his guilt to a perſon, and by him afterwards related to the perſon making the affidavit, the Court will allow ſuch affidavit to be read, if the perſon to whom the defendant made ſuch declaration be under his influence, and on application from the proſecutor for ſuch purpoſe, refuſe to come forward and teſtify the fact. Rex v. Archer, 2 Term Rep. 203. *notis.*

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An attorney convicted of a miſdemeanor may be fined, impriſoned, ordered to find ſureties for his good behaviour, and be ſtruck off THE ROLL; for the penalty for ſubornation of perjury inflicted by 5 Eliz. c. 9. is no guide as to the puniſhment of ſimilar offences at common law. 4 Term Rep. 206.

JONES *Juſtice* ſaid, This is no ſubornation of perjury, but only an endeavour to procure one to get another to prove a writing forged, &c. Here is no perjury committed, no act executed; for ſubornation the ſtatute 5 *Eliz. c.* 9. gives but forty pounds fine, and this is not ſo great a crime as that; and therefore I think forty pounds fine enough.

WYLDE *Juſtice. Johnſon* was not the contriver of this knavery, for *Holton* was the main agent as appears to me, and my brother JONES's opinion ſways with me as to the penalty by the ſtatute, and therefore I think fifty pounds fine enough; to which JONES conſented for agreement ſake.

TWISDEN *Juſtice.* I muſt go according to what the jury finds, and therefore am for five hundred marks; ſureties for his good behaviour for ſeven years; and his name to be ſtruck out of the attorney's roll.

SCROGGS *Chief Juſtice* ſaid, he was for five hundred pounds, but to prevent a leſſer ſum, he would agree with his brother TWISDEN.

But before this he made a long ſpeech to aggravate the fault, with a hint or two that he did it not out of malice, or any remembrance of paſt faults. An *endeavour* (ſaid he) in the divine law, makes a man as guilty as the *commiſſion:* PERJURY is a heinous crime; and was in old time puniſhed with death; and afterwards the member that was inſtrumental therein was cut off from the body; but now the ſtatutes are more tender and not ſo ſevere, (*x*) and the reaſon was, becauſe few were then convicted by reaſon of the compaſſion of juries, and the puniſhment was leſſened that more perjuries might be detected; but when we have found them out and the party convict, and no certain penalty, but left to the diſcretion of the court, we ought to make them examples; for as anger does not become a judge, ſo neither doth pity, for one is the mark of a fooliſh woman, as the other is of a paſſionate man.

And TWISDEN *Juſtice* ſaid, upon indictments for perjury, if they have not concluded *contra formam ſtatuti*, the fine has been heightened many times.

See 1 Hawk. P. C. ch. 69. ſ. 15.

* NOTE, *Johnſon* being in cuſtody, was upon this bailed; but it broke his heart, and he died ſoon after, much lamented, and without

An attorney convicted of a miſdemeanor and ſentenced to pay a fine, and find ſureties, &c. admitted to bail.——Poſt, 93, 94.

* [5]

(*x*) The 5 Eliz. c. 9. inflicts on *ſubornation of perjury* a penalty of forty pounds, or impriſonment for half a year, and pillory, and, in either caſe, diſability to give evidence until the judgment is reverſed; and on the offence of *perjury*, a penalty of twenty pounds, and ſix months impriſonment or pillory, and in either caſe diſability as aforeſaid. But this ſtatute does not reſtrain the diſcretionary puniſhment by *fine, impriſonment*, and *pillory*, inflicted by the common law on this offence, 1 Hawk. P. C. ch. 69. ſ. 15. and by the 2 Geo. 2. c. 25. beſides theſe penalties and puniſhments, the offender may be ſent to the houſe of correction, or tranſported for ſeven years; alſo by 12 Geo. 1. c. 29. if any perſon after having been convicted of perjury, or of ſubornation of perjury, ſhall act as an attorney, the judge of the court in which *he* ſhall bring any action may examine the matter in a ſummary way in open court, and order the offender to be tranſported for ſeven years.

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reproach; for every one thought this an hard case; and this crime was committed in order to the detection of a forgery of the *Lady Ivy*'s deed, which, in a trial at the King's Bench bar, many years after this, was proved forged, in *Neal*'s suit against her.

NOTE ALSO, That this *Johnson* was attorney in prosecuting SCROGGS for a debt whilst he was a serjeant.

Case 2. The King *against* Marriott.

The insertion of the words *vi et armis* in an indictment of *forgery* is cured by the statute 37 Hen. 8. c. 8. S. C. 2 Lev. 221. 1 Sid. 140. Cro. Car. 377. Stiles, 12. 3 Peer Wms. 464. 2 Stra. 834. 2 Hale, 117. 2 Hawk. P. C. ch. 25. s. 91.

ON an indictment for forgery exceptions were taken thereto.

FIRST, That it was *vi et armis*, which those indictments use not to have. And after search of records MR. POLLEXFEN came, and said, that they found three with *vi et armis*, and sixteen without it; whereupon it was referred to MR. ASTRY to examine the records.

A literal translation of the words of a statute was sufficient while proceedings were in Latin. S. C. 2 Lev. 22. Cro. Eliz. 231. 3 Bulst. 178. Cro. Jac. 129. 2 Hale, 169. 2 Hawk. P. C. ch. 25. s. 88. 1 Hawk. P. C. ch. 70. s. 26.

SECOND EXCEPTION was, That the jury had found him guilty *de forgeria supradict.* Now there is no such word as *forgeria*, either in law or grammar Latin. But notwithstanding these objections, judgment was afterwards given for the king. And thereupon a writ of error was brought.

MR. WILLIAMS upon the writ of error now moved several exceptions, as that above, that the jury found him guilty *de forgeria: non allocatur*, for the words make it plain enough what their verdict and meaning is, and a jury of *lay gents* are not supposed to understand much Latin. (*a*)

"*A certain writing*," is a sufficient description of the *deed* forged. 1 Salk. 342. Noy, 101. 1 Sid. 16. 155. 278. 451. 3 Mod. 66. 2 Bl. Rep. 787. 790. Dougl. 300.

THIRD EXCEPTION. That it ought to be a deed sealed, and here it is only *scriptum*, whereas the statute requires it should be a deed sealed; and this was *Newton's case* in this court, where such indictment was quashed because not said *sigillat'*,—*Sed non allocatur*, Because in this case when the deed is recited, it is concluded with *datum et sigillat'* such a day and year, though before it is only said *quoddam script'*.

The caption of an indictment good though it omit the words *probarum et legalium*. 2 Roll Abr. 82. Cro. Eliz. 751. Cro. Jac. 635. Poph. 202. 1 Lev. 208. Ld. Ray. 592. 609.

* FOURTH EXCEPTION, It is *per sacrament' duodecim*, and does not say *probarum et legalium*, and this was *Oly*'s *case*, *Cro. Jac.* 635. where an indictment *super visum corporis* was quashed for this fault.

(*a*) By the 36 Edw. 3. c. 15. all law proceedings were to be entered and enrolled in *Latin*, but now by 4 Geo. 2. c. 16. and 6 Geo. 2. c. 14. they are directed to be in *English*, except terms of art, &c.

Non

Non allocatur; for in case of a petty jury for trial of an issue, it is always concise and short as here, only *duodecim*; but in case of the first jury that finds the indictment or inquisition, it is always then with *proborum et legalium.* (*b*)

FIFTH EXCEPTION. The indictment is said to be by a jury sworn *ad inquirend' pro domino rege et corpore com'*, whereas it ought to be *pro domino rege pro corpore*, and without an &; so that here is a distinction where none ought to be; for the oath is, "you are to "enquire for our sovereign lord the king for the body of the "county."

The caption of an indictment good, though it state that the jury were sworn to enquire "for "the king *and* "the county" instead of "*for* "the county."

Sed non allocatur, for it is all one, and there is no difference.

SIXTH EXCEPTION, The statute 5 *Eliz. c.* 14. requires that the party convicted shall pay double costs to the informer, and this is part of the judgment; but here is no such thing upon record, and therefore the judgment is imperfect.

A judgment on the 5 Eliz. c. 14. need only award *double costs* when there is an informer. 3 Inst. 172. 1 Hawk. P. C. ch. 71. s. 24.

But held by THE COURT to be nothing material; for that is only in case there be an informer; here is none; and it is upon the informer's account, and he might waive it or release it, if there were such.

JUDGMENT was affirmed.

(*b*) See 2 Hawk. P. C. ch. 25. s. 17. where it is said that this is no exception to an indictment found in the court of King's Bench, or grand sessions, or counties palatine, and has often been overruled as to indictments in other courts: and see 2 Hawk. c. 25. s. 126.

Lisle *against* Gray. Case 3.

Trinity Term, 22 Car. 2. Roll 141.

EJECTMENT. Special verdict. A. covenants to stand seised of lands, to and for the use of himself for the term of his natural life; and after his decease to *Edward* his eldest son *for life*; then to the first, second, third, fourth, fifth, and tenth son, &c. as is usual, and then there is this clause, "And so severally and respec-"tively to all and singular the heirs males of the heirs males of the "body of *Edward*, &c."

If a man, with intent to preserve his estate in his name and blood, covenant to stand seised to the use of himself for life, and after his decease to the use of *Edward* his first son *for life*, and the heirs male of such first son, and in default of such issue to the use of the second son of *Edward* and the heirs males of such second son, &c. "and so severally and respectively to all and singular the heirs "males of the heirs males of the body of *Edward*."—*Edward* takes only an estate *for life*——S. C. Pollexf. 582. S. C. 2 Jones, 114. S. C. Ray. 278. 302. 315. S. C. 2 Lev. 223. S. C. 1 Freem. 462. S. C. 2 Atk. 91.

The question was, What estate *Edward* had?

MR. LEVINZ argued, that *Edward* is but tenant for life. All courts will interpret all conveyances according to the intent of the parties as far as the words will bear; it is expressly limited to him for life, * and there is no inheritance in him at all: and another clause in the deed makes it clear, *viz.* if *Edward* die without issue,

LISLE v. GRAY.

there is proviſion made for daughters; if he had been deſigned tenant in tail, there needed not that proviſion, for he would have been able, &c. as for the words themſelves in the laſt clauſe on which the doubt ariſes, where the heirs males are, it is clear, it was only a miſtake in the ſcrivener, inſtead of *ſons*, to write *heirs males*, elſe it had been the common limitation for life. I confeſs "*heirs males*" import an inheritance, yet they may be ſo qualified as to imply nothing but an eſtate for life; as if I grant an eſtate to a man and his heirs for the life of another; there "*heirs*" are ſo qualified as to make no inheritance; ſo if tenant in tail grant an eſtate to a man and his heirs for his life; and ſo here in our caſe. And as to "ſo ſeverally and reſpectively," "ſo" there only demonſtrates what heir, and it is, as in a ſheriff's return, "*ſic reſpondet.*" I have known it ruled in this court, that when a *venire facias* has gone "*præceptum eſt per Cur.*" and, in another *venire facias*, where "*per Cur.*" has been omitted, and it run only "PRÆCEPTUM *eſt ſicut prius*," and adjudged good; and ſo it may be here as it was in *Co. Lit.* 20. where a gift to a man *et hæredibus de corpore exeunt*, remainder to B. *in forma predicta*, this was ruled to create a tail: ſo here the word "ſo" ſhould reſtrain and qualify the words ſo as only to mean *ſons*, &c.

On the other ſide it was argued to be an eſtate tail executed, and that there are ſufficient words to make it ſo. *Co. Lit.* 22. Feoffment to the uſe of a man's ſelf for life, and then to the uſe of the heirs males of his body, &c. this is a good eſtate tail veſted and executed in himſelf, and the limitation is good by way of uſe, and though it be a double limitation, yet it is good; and ſo is *Shelly*'s *caſe*, 1 *Co.* 95. there was alſo cited the caſe of *Boreton v. Nichols*, *Cro. Car.* 364.

WYLDE *Juſtice* compared it to *Archer*'s *caſe*, 1 *Co.* 63.

SCROGGS *Chief Juſtice* ſaid, that the intention of the party ought to be reſpected, and it ſeems to me that "*heirs males*" are nothing but inſtead of "*ſons.*"

* [8] * And JONES *Juſtice* ſaid the ſame, and they all three (TWISDEN abſent) inclined to be of opinion that he was but tenant for life. *Adjornatur.* (*a*)

(*a*) THE COURT, in the Trinity Term following, was of opinion that *Edward* had only an eſtate for life; for there was an expreſs limitation to him for life, and an eſtate tail limited to each of the ſons; and judgment was accordingly given for the plaintiff. S. C. T. Jones, 115. S. C. 1 Freem. 462. The defendant brought a writ of error, and upon the firſt argument the court of exchequer inclined to affirm the judgment; (Sed vide S. C. Raym. 278. 302. 315.) but before it was affirmed or reverſed, the ſuit abated by death. S. C. 2 Lev. 225: It is ſaid however that a new ejectment was brought, S. C. 2 Lev. 225. and that judgment for the plaintiff was affirmed on error in the exchequer chamber, by the opinion of the greater part of the judges and barons, S. C. Pollexfen, 591; and in a marginal note to the caſe of Hodgſon v. Buſſey, it is ſaid, that on ſearch made by Mr. JUSTICE TRACY, this affirmation of the judgment for the plaintiff is entered on the record, 2 Atk. 90.

Gunning

Gunning *againſt* Gunning.

Caſe 4.

WASTE. The defendant pleaded "no waſte committed *modo et forma prout, &c.* The jury find he did *modo et forma* as in the count.

A declaration in *waſte* that the defendant ploughed up the land which was paſture, *et ſic fecit vaſtum*, is bad, for uncertainty, even after verdict.

2 Roll Abr. 816.
Co. Lit. 53.
1 Lev. 309.
1 Mod. 94.
3 Mod. 90. 113.
2 Saund. 254, 255.
1 Ch. Rep. 106, 116.

Moved in arreſt of judgment, that the plaintiff in his declaration does not ſo much as alledge a waſte done, but leaves it abſolutely uncertain; for he ſays, that the defendant did plough up his land which was paſturable, *et ſic vaſtum fecit*, and ſo *non conſtat* to the court that it was waſte; and the verdict does not help it, for that only ſays they did it *modo et forma prout in narratione:* now the ploughing *paſture* may be, or may not be waſte; and to make it ſuch, it ought to have been *paſture* time out of mind, and it is not enough to ſay that this was paſture ground *diu ante.*

JONES *Juſtice* ſaid, Arable and paſture ground are convertible, and that which is one of them this year, may be the other the next, and the law does not ſo much diſtinguiſh.

And therefore judgment was ſtayed. (*a*)

(*a*) After verdict nothing is to be preſumed but what it either expreſsly ſtated in the declaration or neceſſarily implied from thoſe facts, which are ſtated, Spires v. Parker, 1 Term Rep. 141; for a verdict will only cure ambiguity, but will not aid where the giſt of the action is omitted in the declaration, Avery v. Hoole, Cowp. 826. See alſo Ruſhton v. Aſpinal, Dougl. 679.

Frederick *againſt* Cotton.

Caſe 5.

CASE upon the cuſtom of merchants againſt the acceptor of a bill: after verdict it was moved in arreſt of judgment, that the parties were not averred to be merchants; and upon debate THE COURT ſaid, that they would intend them ſuch.

An action on a bill of exchange is good after verdict, though it is not averred that the parties are merchants.——Ante, 180.
N. Lut. 70. 270.

THEN another exception was moved, that the bill was payable to the order of the plaintiff, and there was no order alledged.

A bill made payable to the *order of A.* is payable to *A.*

But THE COURT reſolved without any difficulty, that if by deed, bill, or other writing, money be to be paid to a man's order, it is due to himſelf; ſo the plaintiff had his judgment.

Ante, 235.
Comb. 401.
10 Mod. 286.
Com. Rep. 76.
Kyd on Bills, 22.
Bull. N. P. 273.

* NOTE, A general *indebitatus aſſumpſit* does not lie on a bill of exchange, but the party ought to declare ſpecially on the cuſtom of merchants, *ut ſupra.* (*a*)

The declaration on a bill of exchange muſt be ſpecial on the cuſtom of merchants.——Hard. 485. 6 Mod. 129. 131. 3 Lev. 298. 3 Lev. 118. 1 Lut. 180. 1 Mod. 285. 11 Mod. 190.

(*a*) Reſolved accordingly in the caſe of Hodges v. Steward, 1 Salk. 125. that a general *indebitatus aſſumpſit* will not lie by an *indorſee* againſt the *drawer* of a bill of exchange. See 1 H. Bl. Rep. 602; but it will lie by *a payee* againſt the *drawer*, 1 Mod. Ent. 312. Morg. Prec. 548. or by the *indorſee* of a note of hand againſt the preceding *indorſer*, Keſſebower v. Tims, Bailey on Bills, 47. and it ſeems that wherever *a privity* exiſts between the parties, an action of *debt* or *indebitatus aſſumpſit* may be maintained; Kyd on Bills 114.

Trinity

Trinity Term,

The Thirtieth of Charles the Second,

IN

THE KING's BENCH.

Sir WILLIAM SCROGGS, *Knt. Chief Juſtice.*

Sir THOMAS TWISDEN, *Knt.*
Sir WILLIAM WYLDE, *Knt.* } *Juſtices.*
Sir THOMAS JONES, *Knt.*

Sir WILLIAM JONES, *Knt. Attorney General.*

Sir FRANCIS WINNINGTON, *Knt. Solicitor General.*

Trigg *againſt* Turner.

Caſe 6.

REPLEVIN. The defendant avows as bailiff in diſtraining for *damage feaſant*. The plaintiff in bar to the avowry pleads preſcription, to have common all times of the year in the place WHERE, being foreſt.

A preſcription generally, to have common in *a foreſt* at all times throughout the year is good without an exception of the *fence month*.

STRODE *Serjeant* moves in arreſt of judgment, there having been a verdict for the plaintiff in the replevin: he would have all preſcriptions to common in foreſt land to be void, unleſs the land to which, &c. be foreſt land too; it has been adjudged in this court, that the foreſt law is not the common law of *England*; if a man have a right to common in a foreſt, yet if he do not claim it, and if it be not allowed in ſome *eyre*, he loſes his right. THEN * he inſiſted, that the preſcription was too large and general; for by the foreſt law there is a *fence month*, in which it is a forfeiture to put in

S. C. 3 Keb. 746.
S. C. 3 Lev. 98.
S. C. Pollexf. 443.
1 Jones 99. 283. 286.
N. Lut. 30. 473.
Manw. 217.
4 Inſt. 298. 3 Bulſt. 213. Lut. 81. Cro. Jac. 155. Hard. 87. 3 Cam. Dig. "Chaſe," (O 3.)

their

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their cattle, and they have mentioned nothing thereof in their plea; ſo that it is laid too general.

MR. HOLT likewiſe on the ſame ſide: No man can preſcribe for common in a foreſt if he have no land in the foreſt (*a*) A preſcription *extra foreſtam* is not good without allowance. (*b*) A man cannot depaſture any cattle there without a ſpecial preſcription: then if he have it, as this caſe is, it can have no good commencement, neither can it be tried; for if triable by any, it muſt be by the verderors, &c. and they cannot, becauſe it is appendant to land without the foreſt; and their juriſdiction is limited by 33 *Edw.* 1. *ſt.* 5. where it was enacted, "that thoſe whoſe lands be exempted from the foreſt, "ſhall not by right of thoſe lands have common in the foreſt, but "if they will return, they ſhall." As for the *fence month*, which begins about the ninth of *June*, and ends about fourteen or fifteen days after *Midſummer*, there is an expreſs law that none ſhall have common there that month. (*c*) Now here is a preſcription for the whole year, and it can be had but for eleven months only, it is therefore naught; for if in any caſe a man lay his preſcription larger than the law allows, it is all void; (*d*) as preſcriptions, cuſtoms, and bye laws within manors to bind all perſons, when in the particular it will bind only the tenants, and not ſtrangers, ſuch is void, (*e*) and alſo, that if any cattle be upon ſuch and ſuch land, and do break their bounds, that they ſhall be forfeited, now though this be good againſt a tenant of the manor, yet it is void againſt a ſtranger; and therefore in that caſe it was adjudged void, (*f*) being laid too general in action brought thereupon. Another ſuch like reſolution you have in the caſe of *Harbin v. Green.* (*g*) A preſcription is an intire thing, &c.

MR. POLLEXFEN *for the plaintiff.* They ought to have alledged in their avowry, that it was a foreſt which had the offices and places uſually appendant. COKE ſays, (*h*) that by preſcription a man
* [11] may * have common for his ſheep within the king's foreſt: beſides, there are a great many nominal foreſts; but ſuppoſing this be a foreſt, yet according to *Coke*, as I ſaid before, a preſcription may be for common therein; for ſuppoſe the king does, as he may, diſafforeſt his own land, yet thoſe that had common there before ſhall have it ſo ſtill, by CHARTA DE FORESTA as appears in *Manwood*, (*i*) and this may be for all the year, ſuch as it was before: And then he ſays, that ſwine and geeſe are forfeited if put into common the *fence month*, which implies, that other cattle may be in that month: And alſo the articles about foreigners, that they may not have common or put in any cattle in the *fence month*, implies, that thoſe who have an ancient right may, and there is no poſitive direct authority againſt me. The ſtatute of *Ordinatio Foreſtæ* (*k*) though LORD COKE ſays it is

(*a*) Jones, 292.
(*b*) Manwood's Foreſt Law, title "Common," 77, 78.
(*c*) Manwood 74, 75. But ſee Lutw. 81.
(*d*) 1 Jones, 286.
(*e*) Year Book, 11 Hen. 7. pl. 14.
(*f*) Year Book, 21 Hen. 7. pl. 40.
(*g*) Hob. 189.
(*h*) 4 Inſt. 298.
(*i*) 9 Hen. 3. ſt. 2. c. 5. Manwood, 77, 78.
(*k*) 33 Edw. 3. ſt. 5.

ſo

no ſtatute, yet perhaps it is ſo, grants common, &c. As to the objection about the trial, the *fourth inſtitute* (*l*) in the chapter about the courts of foreſts ſays, that the very fact of *the verderors* may be traverſed, and, if there be any claim, diſallowed there, yet it is not final. FURTHER, it is not ſaid, that our lands (to which we preſcribe this common to belong) are within or without of the foreſt, and therefore they may be within as well as without, and ſo intended. He alſo cited the *caſe of Leiceſter foreſt* in *Cro. Jac.* 155.

SCROGGS *Chief Juſtice* ſaid, that he was inclined to believe they might have common, and a preſcription preſuppoſes a grant from the king; and he quoted the caſe of *Sir Edward Sawyer* in *Jones*, 287. where it was allowed to copyholders to preſcribe for common generally.

Judgment for the plaintiff.

(*l*) 4 Inſt. 290. See 3 Com. Dig. "Chaſe" (R. 1.)

Colton *againſt* Senhouſe. Caſe 7.

Trinity Term, 29 *Car.* 2. *Roll* 90.

EJECTMENT. Special verdict finds an indenture between the ſon, who was ſeiſed of the lands in queſtion by deſcent from his father of the one part, and his mother and her ſecond huſband of the other part; whereby the mother and her huſband do releaſe and confirm to the ſon, the lands for and during the * life of, &c. and it is covenanted and agreed by and between them and the ſon, &c. That if he die without iſſue of his body, then he grants and gives the ſame to his natural mother and her heirs for ever. The ſon dies without iſſue, the mother enters, the heir makes a leaſe to the plaintiff.

If an indenture be made between a ſon ſeiſed of lands by diſcent from his father of the one part, and his mother and her ſecond huſband of the other part, whereby the mother and her huſband alien and grant all the lands of the wife's jointure by her former huſband for the life of the wife, and the ſon alſo covenants that if he ſhould die without iſſue, he then granted releaſed, and confirmed, the lands to his mother; this is a *covenant to ſtand ſeiſed* by which a uſe is raiſed to the mother; for it being plain that the parties intended the covenantee ſhould have the eſtate, the court will mould the words ſo as the intent of the parties ſhall take effect. ——— S. C. 2 Lev. 225. S. C. Pollexf. 523. S. C. 2 Jones, 106. 2 Roll Abr. 783. Carth. 39. 2 Lev. 214. 3 Lev. 120. 370. 372. 2 Vent. 149. 260. 266. 1 Vern. 141. 2 Vezey, 252. Cro. Jac. 168. 1 Vezey, 127. 2 Wilſ. 22. 75. 1 Com. Dig. "Covenant," (G. 2.) Cowp. 725.

The queſtion is, if any *uſe* was raiſed by this to the mother.

LEVINZ *for the plaintiff*. No uſe can be granted out of an eſtate of which a man is not ſeiſed. (*a*) A *feme covert* cannot covenant, nor can the father-in-law covenant, becauſe the one is not of *the blood*, and the other is under *covert baron*; therefore it is not a uſe, but only a covenant or agreement binding them during their lives, and it ſhall afterwards go to the right heir: and he urged the caſe of *Buckler v. Symonds*, (*b*) A. ſeiſed in fee covenants with B. in conſideration of a marriage to be had between the ſon of A. and daughter of B. that the ſaid land ſhall, from and immediately after

(*a*) 2 Co. 15. 2. Moor, 342. Cro. Eliz. 401. (*b*) 2 Roll Abr. 788. See alſo Hob. 313.

the

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the death of A. remain and be unto the ſaid, &c. In this caſe, albeit the marriage took effect, yet no uſe aroſe by the covenant, becauſe there were no apt words; he did not covenant to *ſtand ſeiſed*, but only that it ſhould *remain:* and the caſe of *Pitfeild v. Pierce*, (*c*) A. ſeiſed in fee, did in conſideration of the marriage of his ſon B. to E. ſeal and deliver a deed poll to this effect, "BE IT KNOWN, "&c. That I *A.* do give and grant by theſe preſents, unto my ſon "*B.* the ſaid land after my deceaſe to have and to hold. In witneſs "whereof to this my deed of gift I have hereunto ſet my hand, "&c." This not being executed by livery or inrolment, the queſtion was, if it ſhould paſs by way of covenant to ſtand ſeiſed; and held it ſhould not, becauſe it did not appear that he intended to ouſt himſelf of the land during his life; for he granted it to B. after his death before the *habendum*, ſo that he did not intend to make himſelf barely tenant for life, which is our caſe; for the ſon ſays, "if he die without iſſue, then he gives and grants to his mother, &c." Then it was moved again in the caſe of *Pitfield v. Pierce*, that it ſhould not alter the eſtate of the father, but that he ſhould be ſeiſed
* [13] in fee during * his life, and his eldeſt ſon ſhould have it by way of contingent uſe after his death; but the Court ſaid, that would be harder to maintain than the former, and therefore they gave judgment as afore, that his intent was to convey at the common law. But they agreed, that if it appear by a deed to be the intent of him that is ſeiſed of the land, that it ſhall paſs an eſtate according to the rules of law; and ſaid, that this ſhall ſo paſs, although that there are not formal words of covenant in it. He urged further the caſe of *Foſter v. Foſter*, (*d*) in this court, where the mother gave all her land to her ſon, with an "ITEM, It is covenanted and granted by and be-"tween the parties, that ſhe ſhould enjoy it during her life;" and ruled to be only *an agreement*, and not *a covenant* to ſtand ſeiſed. Here the words are, "if he dies, then he gives and grants," *i. e.* if he ſhall die he will give and grant, as it is uſual in common ſpeaking to ſay, "to-morrow is a feaſt," *i. e.* "will be a feaſt;" and it is only a deed of articles and covenants, and deſigned for no more; the words themſelves will not veſt an eſtate, for eſtates muſt be guided by the law and its rules; and ſo is *Doctor* and *Student*, (*e*) where it is held, that if the intent of the parties be not according to the rules of the law, it is void; as in caſe of a leaſe for years to a man and his heirs, the intent is void, for it is the law muſt direct and govern the eſtate. There was alſo cited a reſolution in *Chudleigh's caſe*, (*f*) that no uſes ſhall be executed by the ſtatute of 27 *Hen.* 8. *c.* 10. which are limited contrary to the common law; for it appears by the preamble, that the intent of the makers was to reſtore the ancient common law of the land; and he cited *Engleſield's caſe*, in *Popham*, (*g*) which you may peruſe at large, for it was much inſiſted upon.

(*c*) March, page 50. caſe 78. and S. C. 2 Roll Abr. 789.

(*d*) Hilary Term, 13 & 14 Car. 2. 1 Sid. 82. 1 Lev. 55. 1 Keb. 160. 225. 274. 319. Ray. 43. Finch Ch. Rep. 170. and cited in Scudamore v. Croſſing, 2 Mod. 177.

(*e*) Dr. & St. lib. 1 cap. 24.

(*f*) 1 Co. 129.

(*g*) Poph. 20.

MR.

MR. POLLEXFEN *e contra.* That here an eſtate ariſes by way of uſe; the ſon was ſeiſed in fee by diſcent as the jury find it; he by deed indented between him and his mother and her ſecond huſband, doth covenant and agree to and with, &c. that if it ſhall happen that he ſhall die without iſſue of his body, then he gives and grants the lands in queſtion to his mother and her heirs for ever." * He urged, that uſes before the ſtatute were of an equitable nature; that they were not eſtates in the land, but only truſts and confidences, and not ſubject to the rules of law until they were veſted and raiſed; but in raiſing of them they are different from all manner of eſtates at common law; and therefore they need not ſuch ſet form of words to raiſe them as other eſtates do; at beſt they were themſelves but an equitable intereſt or right. He alſo urged *Fox's caſe*, (*b*) where a demiſe and grant was adjudged to amount to a bargain and ſale within the ſtatute of uſes; for to make a freehold or inheritance paſs by deed indented and inrolled, there needs not the preciſe words of bargain and ſale, but words equivalent or tantamount are ſufficient; and ſo he would have it here, that a conſtruction may be to raiſe an uſe, though the words are "give and grant, &c." for ſaid he, if a covenant to ſtand ſeiſed upon a valuable conſideration may be deemed a bargain and ſale, it may *e contra.* He further argued, that for the raiſing of an uſe here were words more ſignificant than that of "covenant," for "covenant" alone would never paſs any eſtate in land, but the word "grant" might; and cited a caſe of *Scudamore v. Croſſing.* (*i*) And as to the caſe of *Pitfield v. Pierce*, (*k*) which they ſo much relied upon of the other ſide, he anſwered, that the ſame was never much argued, for neither CROKE nor JONES mentioned it in their reports; and it differed from the preſent caſe; for that here is nothing to make a tenant for life, but all upon a contingency, and no preſent grant; whereas *Pitfield's caſe* is a preſent grant to commence after his death; and ſo he anſwered the grand objection of raiſing a freehold *in futuro*; for that, ſaid he, may be by way of uſe upon a contingency: uſes (ſaid he) may be raiſed in this manner, as in *Shelley's caſe*, (*l*) and the caſe of *Woodliff v. Drury*, (*m*) where lands were to the uſe of a wife that ſhould be; and the feoffor afterwards marrying, it was held the wife ſhould take by that limitation, though it was objected, that preſently by the feoffment the fee was in the huſband by the poſſeſſion executed to the uſe * which he had before the marriage, and that uſes *in futuro* could not riſe upon ſuch future acts; for then an uſe might riſe out of an uſe. But it was there ruled by all the court, that though he were ſeiſed in fee in the mean time; yet by the marriage the new uſe did ariſe and veſt, there having been no act in the mean time to deſtroy the future uſe; then it is not neceſſary that there be an intent apparent in the deed to raiſe uſes. In the caſe of *Tebb v. Popplewell*, (*n*) and in the caſe of *Scudamore v. Croſſing*, (*o*) the

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(*b*) 8 Co. 93.
(*i*) Trinity Term, 23 Car. 2. 1 Mod. 176. 1 Vent. 137.
(*k*) March, 50. 2 Roll Abr. 789.
(*l*) 1 Co. See alſo Bro. "Feoffment to uſes," 59. 2 Roll Abr. 791. 3 Cro. 439.
(*m*) Mich. Term, 37 & 38 Eliz.
(*n*) 2 Roll Abr. 786.
(*o*) 1 Mod. 175, 176.

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words of covenant to ſtand ſeiſed are not neceſſary; and upon this caſe he moſtly inſiſted: and in the preſent caſe is no intention that appears to make any eſtate to paſs at the common law, and it may well bear a uſe, it ought ſurely to work ſome way if poſſible: all the caſes cited on the other ſide did not ſhew any reference or intention to conveyance by the deed, but here is expreſsly, "doth grant:" the judges will not deſtroy a deed for its informality, or the ignorance of former times. Therefore he concluded, an eſtate was raiſed to the defendant, there being a manifeſt intention that ſhe ſhould have it, and words tantamount to a *covenant to ſtand ſeiſed*, &c.

And afterwards in *Eaſter* Term, 31 *Car.* 2. JUDGMENT was given accordingly, that the limitation to the mother amounts to a covenant to ſtand ſeiſed, &c. and this judgment afterwards affirmed upon a writ of error, &c. *Vid. Poll.* 537.

See the caſe of *Coryndon and his wife*, adjudged in the Court of Common Pleas in *Eaſter* Term 1717.

Caſe 8. Holmes *againſt* Ivy.

A bond conditioned for the delivery of 35,000 tiles to the value of £. 144 at 15*s.* 6*d.* a thouſand, is good for the ſum of £. 144 although the number of tiles at the price mentioned do not amount to that ſum.

Ray. 61.
1 Lev. 85.
Keb. 380.
Stiles 241.
6 Mod. 227. 260.
N. Lut. 189. 207. 215.
2 Term Rep. 388.

DEBT upon a bond: the defendant demands *oyer* of the condition, which was for the delivery of thirty-five thouſand tiles to the value of one hundred and forty-four pounds, at fifteen ſhillings and ſix-pence *per* thouſand. He pleads, that he did deliver the full number of thirty-five thouſand tiles, worth fifteen ſhillings and ſix-pence a thouſand.

The plaintiff demurs, becauſe he did not alledge that they were in all worth one hundred and forty-four pounds, which was the thing that they intended, and the penalty was double the ſum, *viz.* two hundred and eighty-eight pounds.

NOTE. The condition ſhould have been to deliver one hundred and eighty-five thouſand tiles, which according to the condition would have amounted to the full ſum of one hundred and forty-four pounds.

* SCROGGS *Chief Juſtice* ſaid, it was juſt to ſupply miſtakes in the conditions of bonds; and it ſeems very plain, that the intent of the party was to ſatisfy a debt of one hundred and forty-four pounds, and that they agreed it ſhould be paid in tiles, at fifteen ſhillings and ſix-pence *per* thouſand, and it is the ſum of money and not the number of tiles is the thing material. We ſhall not therefore invalidate the bond; and if according to the miſtake the condition be impoſſible and cannot be performed, then it is againſt the defendant too, for then the condition is void, and the bond good becauſe ſingle and ſtill obligatory: ſo *utraque via* it is with the plaintiff.

* [16]

And accordingly JUDGMENT was given for the plaintiff.

Helmore

Helmore *againſt* Shuter, and another. Caſe 9.

Eaſter Term, 30 *Car.* 2. *Roll* 465.

CASE, upon a promiſe *by parol*, in conſideration of marriage, to pay in his life time, or to leave at his death the ſum of two thouſand pounds. The promiſe was made, and laid to be made, in *February* 1676. The action was brought in *Michaelmas Term* 1677. The defendant's teſtator died in Auguſt 1677. In the interim between the promiſe and that time, the act 29 *Car.* 2. *c.* 3. againſt frauds and perjuries was made, whereby it was enacted, "That no "action ſhall be brought whereby to charge any perſon upon any "agreement in conſideration of marriage, unleſs ſome note or "memorandum thereof be in writing ſigned by the party, or ſome "other perſon thereunto by him lawfully authorized." The words are, "That from and after the 24th of *June* 1677, no action "ſhall be brought, &c." and all this matter was found in a ſpecial verdict.

The clauſe in the 29 Car. 2. c. 3. "That no "action ſhall be "brought upon "anagreementin "conſideration "of marriage, "unleſs it be in "writing," does not extend to promiſes made *before*, though not to be performed till *after* the making of the ſtatute.

S. C. 2 Mod. 310.
S. C. 1 Freem. 466.
S. C. 2 Lev. 227.
S. C. 2 Jones 108.
S. C. 1 Vent. 330.
1 Bac. Abr. 75.
1 Com. Dig. 146.
4 Burr. 2461.

MAYNARD *Serjeant* argued, that the promiſe was void by the ſtatute, the action being commenced after the ſtatute, though the promiſe was before; and inſiſted upon the words of the enacting clauſe, which was, "That from and after the 24th of *June* no "action ſhould be brought," than which, he ſaid, nothing could be plainer; for it was not that no ſuch promiſe after ſuch time ſhould bind, but that "no action ſhall be brought, &c."

*MR. POLLEXFEN *for the plaintiff.* The penning and words of the ſtatute plainly intend only promiſes after the 24th of *June*, and never deſigned a retroſpect to avoid marriage agreements made and concluded at any time before; and ſo were, as he ſaid, the judges opinions at *Serjeant's Inn*, in a certain caſe of a deviſe of land by will in writing, not having three witneſſes to it, made and publiſhed before the act, whoſe teſtator died after the act, yet held good; though the words of this act about wills are "no deviſe or bequeſt "of, &c." Now it is no deviſe till after the teſtator's death; and yet it was held good enough; and though this was no judicial opinion, yet he ſaid, the title and ſtyle of the whole act was plain enough, that it deſigned only a proſpect for the future; the title being "An "act for the prevention of frauds."

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SCROGGS *Chief Juſtice*, WYLDE and JONES *Juſtices* (TWISDEN *Juſtice* abſent) ſaid, they believed the intention of the makers of that ſtatute was only to prevent for the future, and that it was a cautionary law; and if a motion were made in the Houſe of Lords concerning it, they would all explain it ſo; beſides, it would be a great miſchief to explain it otherwiſe, to annul all promiſes made by parol before that time, upon which men had truſted and depended, reckoning them good and valid in law, as they are yet amongſt honeſt men.

And therefore judgment was given for plaintiff.

Caſe 10. Bourne *againſt* Cooling.

A variance in the NISI PRIUS ROLL, from the PLEA ROLL of *Guardino* inſtead of *Guardiano*, is not fatal.

Stra. 889. 1 Com. Dig. "Amendment" (C. 2.) 1 Term Rep. 783.

CASE, upon an eſcape, againſt the defendant, being MARSHAL of the King's Bench, for the eſcape of a priſoner formerly in THE FLEET, and, upon an *habeas corpus*, brought before a judge of this court, and turned over to THE KING'S BENCH PRISON.

After verdict it was moved in arreſt of judgment, and theſe exceptions were taken to the declaration.

FIRST, That it was "*Guardino*," inſtead of "*Guardiano*" for the warden of the Fleet.

THOMPSON *for the plaintiff* ſaid, That in his paper book which was ſigned by the officer of the court, the clerk of the papers, it was right, *Guardiano*, and that it was ſo in the *plea roll*; and he did hope that the miſtake of a letter in the *niſi prius roll*, would not be ſufficient to arreſt a judgment.

A declaration for an eſcape, that the priſoner by virtue of a *habeas corpus* to the FLEET was committed to THE MARSHALL, is bad. 3 Co. 72. Cro. Jac. 588. Poph. 85. 2 Leon. 54. 1 Salk. 272. 2 Stra. 1226.

SECONDLY, It was ſaid, *virtute brevis de habeas corpus* directed to the warden of THE FLEET, he was * *debito modo commiſſus* to THE KING'S BENCH; which is repugnant.

And as to THE OTHER EXCEPTION he thought *debito modo* would help it.

But THE COURT took this laſt exception as material, becauſe it does not appear that he was *committed*; for he cannot be committed by an *habeas corpus*.

And judgment was thereupon arreſted. 1 Term Rep. 238.

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Caſe 11. Wetherhead *againſt* Brookborne.

To ſay of a *dancing miſtreſs* that "ſhe is an "*hermaphro-*"*dite*," is not actionable, unleſs it occaſion ſpecial damage. S. C. 2 Lev. 233. 1 Roll. Abr. 62. 1 Lev. 115. Ray. 87. 1 Vent. 275. 2 Term. Rep. 473.

CASE for words, wherein the plaintiff having uſed the art and myſtery of a *dancing miſtreſs* for divers years paſt, the defendant ſaid of her, "ſhe is no more a woman than I am; ſhe had a baſtard "on *J. S.*; ſhe is an *hermaphrodite*;" and by reaſon of theſe words ſhe loſt many ſcholars to her damage of forty pounds. And verdict for the plaintiff.

MR. LEVINZ and MR. SAUNDERS moved in arreſt of judgment, that "hermaphrodite" is no word of turpitude or crime, but only an imbecility.

To which WYLDE *Juſtice* anſwered, there muſt be *prævaleſcentia unius ſexus*.

SECONDLY, That "ſeveral years paſt," might be above twenty years ago, it not being ſaid "laſt paſt."

But WYLDE *Juſtice* ſaid, the matter is ſcandalous, and the very

words carry damage, and no need to alledge any ſpecial damage; and for the laſt he cited a caſe of *Necroft v. Dunkirk*, in this court, in caſe for words, where the plaintiff did declare himſelf to have been a merchant *per diverſos annos præteritos*, &c. and held good, though he could not be a bankrupt if he had left off his trade; and here the jury have found it as ſhe has laid it. And for the "laſt" the jury would intend it, or elſe preſume, that being once a *dancing miſtreſs* ſhe continues ſo until that the contrary do appear. (*a*)

SED ADJORNAT' *quia Cur' adviſare vult.*

* Afterwards it was moved again by MR. HOLT for judgment. Where the loſs is particular, the allegation ought to be ſo; but if it be of many cuſtomers, a general allegation will ſuffice without particularizing any perſon. (*b*) * [19]

And PER CURIAM, The words are actionable in themſelves: To ſay that a phyſician is no ſcholar is actionable, though a man may be ſo without learning, only it renders him leſs qualified. *See* 1 *Roll. Abr.* 55.

Adjornatur. (*c*)

(*a*) See as to this point of the caſe, 2 Roll. Rep. 84. Cro. Car. 282. Yelv. 159. Ley. 82. 1 Sid. 425. Cro. Jac. 222.

(*b*) That the ſpecial damage muſt be particularly alledged. See Jones 196. and Browning v. Newman, 1 Strange 666.

(*c*) It is ſaid, S. C. 2 Lev. 233. that after divers motions, the judgment was ſtayed; for that young women being taught to dance more frequently by *men* than *women*, the word *hermaphrodite*, unleſs ſpecial damage enſue, is not actionable.

Michaelmas Term,

The Thirtieth of Charles the Second,

IN

THE KING's BENCH.

Sir WILLIAM SCROGGS, *Knt. Chief Juſtice.*

Sir THOMAS TWISDEN, *Knt.*
Sir WILLIAM WYLDE, *Knt.*
Sir THOMAS JONES, *Knt.*
} *Juſtices.*

Sir WILLIAM JONES, *Knt. Attorney General.*

Sir FRANCIS WINNINGTON, *Knt. Solicitor General.*

Light *againſt* Hooper.

Caſe 12.

REPLEVIN. The defendant makes conuſance as bailiff to the *Skinners Company* for a rent, &c. and, after *rien arrere* pleaded, verdict was for the avowant.

A conuſance for rent muſt ſtate a good title; but if it alledge a deed indented, without ſtating the conſideration, *Qu.* if it is not helped, after verdict, on the iſſue of *nothing in arrear.*

Yelv. 108. 4 Mod. 378. 3 Lev. 107. Carth. 74. 7 Co. 25.

It was moved in arreſt of judgment, that there was not a good title ſet forth in one aſſignment; for it was mentioned to be by deed indented, but no conſideration; and in another no attornment.

WYLDE *Juſtice.* He muſt make a good count of his title in his avowry; for the avowant is in nature of a plaintiff.

• SCROGGS *Chief Juſtice.* Pleading *rien arrere* and verdict for him ſeems to ſupply it; for it is ſaid, *virtute cujus fuit ſeiſitus in dominico ſuo ut de feodo,* (*a*) and you come and ſay no, and found againſt you; now if the plea and verdict helped it is the queſtion.

(*a*) 1 Roll. 314. 6 Co. 57. 4 Co. 9. Win. Rep. 31.

Qu. If avowry alledging the place WHERE as *belonging to*, inſtead of *parcel of*, the manor, be good.
1 Term Rep. 701.

ANOTHER EXCEPTION was, that the place where he took the cattle *pertinebat manerio*, and it might belong to it, yet be no parcel of it.

Adjornatur.

Caſe 13. The King *againſt* Emerton.

Qu. Whether a *falſity written* be puniſhable as an *offence* at common law, when no miſchief is done or intended.

1 Sid. 16. 451.
1 Roll. Rep. 431.
1 Roll. Abr. pl. 8, 9.
Cro. El. 166. 296. 853.
Yelv. 146.
3 Bulſt 265.
Winch. 40. 90.
Sed 1 Sid. 142. contra.

INFORMATION for deceit, by writing a letter in the Lord Chief Juſtice *Rainsford's* name, to get *Sir Robert Vyner* to come to *Brentford*.

After verdict, it was moved in arreſt of judgment.

THE CHIEF EXCEPTION was, that it is a private letter, and only deſigned to draw a man to a certain place, and no inconvenience ariſes thereupon; there is no wrong or injury done to any particular perſon.

But MR. ATTORNEY GENERAL ſaid, That the counterfeiting is an offence; he agreed, that in caſes upon the ſtatutes of *perjury* (*a*) and *forgery* (*b*), it muſt be material to the queſtion in hand, and detrimental to ſome one or other; but at the common law it is not neceſſary.

WYLDE *Juſtice*. Suppoſe I have a mind to a man's company, I write a letter to him in another man's name to bring him thither, becauſe he would not come for my ſending: is this an offence? No miſchief is intended, nor does any enſue: the ſtatute is made to make counterfeiting an offence, if any evil follows thereupon; therefore it was not ſo at the common law. Suppoſe I would have a judge come to me at *Brentford*, who will not come upon my requeſt, I therefore write to him from another judge: will an indictment lie hereupon? Surely no; it is only a lie *in ſcriptis*.

THE COURT were divided.

SCROGGS *Chief Juſtice*, and TWISDEN *Juſtice*, that it was an offence; WYLDE and JONES *Juſtices*, that it was not; and ſo it reſted, and no judgment in the cauſe.

* [21] *Quære* therefore, whether a * falſity written be puniſhable as an offence at the common law, when no miſchief is done or intended?

An indictment amended.

SECOND EXCEPTION was, it is ſaid "*Raroli*," inſtead of "*Caroli*;" but that was amended by rule of court.

(*a*) 5 Eliz. c. 9. (*b*) 5 Eliz. c. 14.

Howard

Howard *againſt* Wood. Caſe 14.

Eaſter Term, 29 *Car.* 2. *Roll* 573.

INDEBITATUS ASSUMPSIT for the fees and profits of the office of ſtewardſhip of a court leet and court baron, is brought by a grantee of the reverſion of the office for ninety-nine years, againſt a ſtranger who took the fees and profits thereof, &c.

A grant to two perſons of the office of ſteward-ſhip of an honour, and of the keeping of the court leets and courts baron within the honour, with the perquiſites, "to "hold them, "after a prior "grant deter-"mined, for "thirty years, "if they or "either of "them ſhould ſo "long live," is good; and they may, after the grant takes effect, maintain an *indebitatus aſſumpſit* for taking the fees incident to the *court baron*, as for monies had and received to their uſe.

S. C. 2 Lev. 235.
S. C. 1 Freem. 473.
S. C. 2 Jones 126.
2 Mod. 260.
3 Mod. 173.
11 Co. 3.
2 Roll. Abr. 152
4 Mod. 17.
1 Show. 289.
1 Salk. 465.
Comy. 491.
1 Ld. Ray. 742.
Bull. N. P. 133.

In this caſe the queſtions were two:

FIRST, If ſuch office be grantable in reverſion?

SECONDLY, If this action lies?

As to THE FIRST it was argued, that a ſtewardſhip is a *miniſterial office*, and therefore is grantable in reverſion. The reaſon why a *judicial office* is not grantable in reverſion is, the great regard which the law has thereto; which it has not to a miniſterial office, that being but of a mean conſideration in the eye of the law: in the caſe of *Young v. Fowler*, (*a*) it is adjudged, that the regiſterſhip of an eccleſiaſtical court is grantable in reverſion, becauſe *exercend' per ſe vel per deputatum ſuum:* although *Sir John Savage's caſe* (*b*) ſeems to the contrary. But ſurely a ſteward's office is grantable in reverſion: the grand objection was, that it is partly *judicial*, partly *miniſterial*, as is *Auditor Curle's caſe* (*c*), where the grant of an auditor's place in reverſion is held void, becauſe partly judicial as well as miniſterial, and cannot be divided; and the rule is, *quod officia judicialia non concedantur antequam vacent*; for that otherwiſe great inconveniences would enſue, for he who at the time of the grant in reverſion was able and ſufficient to ſupply the office of judicature, and adminiſter juſtice to the king's liege ſubjects, before the office falls, may become unable and inſufficient to perform it. But it was argued, that the ſtewardſhip of the leet and court baron here were diſtinct; for the former comes by preſcription, the latter of common right; * one may be holden at one time, the other at another time; there may be two ſtewards; and therefore that the ſtewardſhip of a court baron at leaſt may be grantable in reverſion.

SECONDLY, The next point is, if the plaintiff, having a right to the place, can have an *indebitatus aſſumpſit*.—It was argued that he might, becauſe it is his money, and he has a right to it; and by conſtruction of law the defendant received it to his uſe, and then the plaintiff, by bringing his action, gives his ſubſequent aſſent thereto: in the caſe of *Tottenham v. Bedingfield* (*d*) it is agreed, that if one receive my rents I may implead him in a *writ of account*; and then by the bringing of my action there is privity; for I may make a privity by my own conſent, and I

* [22]

(*a*) Trinity Term, 15 Car. 1. in B. R. Cro. Car. 555. and ſee S. C. Cro. Car. 279.
(*b*) Dyer 259. Co. Lit. 3. c.
(*c*) 11 Co. 2.
(*d*) 3 Leon. 24.

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may as well bring *caſe* as an *account*, and ſo is the caſe of *Lady Cavendiſh v. Middleton.* (*e*) And for late authorities there have been two known caſes expreſs in the point, as that of *Arris v. Stukely* (*f*) in the exchequer, about a year ſince; *indebitatus aſſumpſit* for the fees of the office of the controller of the cuſtoms at *Exeter*; and held upon debate that it would lie; for the plaintiff in ſuch action muſt prove his title to the office ere he can make a right to the money, and this is as neceſſary here as in an *aſſize*; ſo that a title to an office may be tried in this action as well as in that: there was alſo in this court the cauſe of *Aſton v. Woodward* (*g*) the two preſent clerks of the papers, concerning that office, tried at this bar, in this action.

THIRDLY, As for its being granted for years, it was anſwered, that it was for ninety-nine years, if they ſhould ſo long live.

MR. BIGLAND *è contra.* An *aſſize* properly lies of an office: the books are full thereof: a ſpecial action of the *caſe* will lie; but not a general *indebitatus aſſumpſit*; there muſt be a contract or agreement of the parties before ever the law will raiſe a promiſe; therefore he thought the action would not lie. The declaration ought to be according to the fact; it is laid that the defendant received the fees *ad uſum et commodum querentis*, whereas in truth he received them to his own uſe. This courſe will turn out *aſſizes* and *ejectments* too, for they will now try all ſuch titles * by this action; nay, they may by the ſame reaſon try titles to land by bringing this action for the profits thereof. The office of a ſtewardſhip of a manor is not grantable in reverſion. (*h*) None can give judgment *in futuro*; none can take an office in reverſion, therefore none can grant it; the office is granted to two perſons, *viz.* to *Lord Howard* and his ſon; now a ſtewardſhip is not deviſeable: ſo a prothonotary's office is not grantable to two, for two cannot have the cuſtody of the rolls, and ſuch patent is void; ſo is *Sir John Fagges's caſe*, (*i*) where it is likewiſe held, that ſuch grant of the office of chief juſtice to two perſons would be void; for it may be granted to twenty as well as to two: as for that caſe of *Auditor Curle*, (*k*) there was an act of parliament to make two perſons one officer. So he concluded that the grant was void; and he urged, that the action was ill brought: the firſt caſe where an *indebitatus aſſumpſit* was brought for the profits of an office, was that of *Bruebill v. Foukes* (*l*) of a coalmeter's place.

* [23]

MR. WILLIAMS, in Trinity Term following, urged, that if it be a miniſterial office it may be granted in reverſion. The counteſs of *Shrewſbury's caſe* (*m*) is expreſs therein; and that he may make a deputy is expreſsly reſolved in the ſame caſe, though there

(*e*) Cro. Car. 141.
(*f*) 2 Mod.
(*g*) 2 Mod. 95, 96. S. C. 1 Vent. 269. S. C. 1 Freem. 429.
(*h*) See the caſe of Sir John Savage, Dyer 259. and Auditor Curle's caſe, 1 Co. 2. Co. Lit. 3.
(*i*) Year Book, 18 Ed. 4. pl. 7. but in Woodward v. Aſton.
(*k*) 1 Co. 2. Co. Lit. 3.
(*l*)
(*m*) 9 Co. 47.

be

be no words in the grant to that effect. The case of the *Office of Walton* (*n*) is another direct resolution in the point. The main objection is, that the office is to be steward of a court leet and court baron both; that of a court leet being a judicial office, that of a court baron being only ministerial; and therefore they would have it a void grant as to the whole. He answered, that it should enure as two several grants; for the first grants the stewardship of a court leet, and then that of the court baron; they may be distinct and separate in grant as they are in their nature; they are two offices, and there may be two stewards; there may be two grants in one deed. And as for the action, there may be many injuries withour force. (*o*)

* MR. ATTORNEY GENERAL *e contra*. It is a question whether a subject may grant this office in reversion? I think not. *Sir John Savage's case* (*p*) afore cited is positive, that if it be a judicial office it cannot be granted in reversion; and if this be but one office, it cannot be good for one part and void for the other; it must be void for the whole. As to the *indebitatus assumpsit*, he cited *Fitzherbert*, (*q*) that if a man enter into my lands and receive the profits, I shall have a writ of account. In *Brook*, (*r*) it is said, that *account* lies not against *disseisors* for want of a privity, which there ought to be in law or fact, as by assignment, or guardian, or on a pretence of the defendant to the plaintiff's use; but cannot be where the defendant claims to his own use. He urged many things insisted on before, &c. * [24]

LORD SCROGGS, in Hilary Term following, delivered the opinion of the court.——We have considered of the case by ourselves, and discoursed it together, and are agreed on both points.

FIRST, Whether an *indebitatus assumpsit* lies against a man who receives the profits of an office claiming a right. If this were now an original case, we are agreed it would by no means lie; for nothing then which might not be tried by itself; but because judgments have been upon it, and that on solemn arguments, and many judgments, though some passed *sub silentio*, yet others have been debated and settled, and particularly in the Exchequer, we are therefore willing to go the same way, and are of an opinion, that it is better to comply with things once used, that are not of very pernicious consequence, than to make one court thwart and contradict another in its judgments: and certainly the inconvenience is not so very great, since the title must be given in evidence, and so is well tried. We do upon that account adjudge that the action doth well lie.

SECOND POINT, Whether the stewardship of a court leet and court baron be grantable in reversion for ninety-nine years, if they shall so long live: we take this to be different from *Sir George Reynold's case*, (*s*) because that was a lease for years absolutely,

(*n*) Dyer, 270. pl. 23.
(*o*) See Rex v. Blisil, Dougl. 398. and Milward v. Thatcher, 2 Term Rep. 81.
(*p*) Dyer, 259.
(*q*) Fitz. N. B. 117. a.
(*r*) Bro. Abr. "Accounts," 89.
(*s*) 9 Co. 95. Cro. Jac. 545. 657. Bridg. 6.

which

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* [25]

which carries it to executors and adminiſtrators, and ſo perhaps to perſons unable; for if it had been * to J. S. for ninety-nine years if J. N. ſhould ſo long live, then it had been naught; but the caſe in queſtion is not ſo, and therefore the reaſons of *Reynold's caſe* do not reach this. Farther, we make a great difference between the place of judges here in a court of record, and ſtewards, who *inter alia* have the keeping of a court of record; the former muſt be perſonally attendant, the latter may exerciſe the office by deputy: ſo *Auditor Curle's caſe* muſt be underſtood *ſecundum ſubjectam materiam*; an auditor's place is an office very great, and cannot be exerciſed by deputy; and ſo it is of any office partly judicial and partly miniſterial, if perſonal attendance be requiſite; and where a deputy cannot be made, there the reverſion cannot be granted. (*t*) But this office may, and uſually is exerciſed by deputy; for ſeveral noblemen have the ſtewardſhip of courts belonging to ſeveral biſhops, and they exerciſe them by deputy. And this was agreed upon by the whole court.

And judgment for the plaintiff; which was *Sir Robert Howard.*

NOTE, Theſe reverſionary grants of offices are of late invention, being firſt introduced in the reign of *James* the firſt, and are contrary to the rule and reaſon of the common law, *nemo enim poteſt dare id quod non habet, &c.* BRACTON.

(*t*) As to what officers may or may not make a deputy, ſee 1 Roll Abr. 591. 4 Inſt. 311. 9 Co. 48. 2 Inſt. 34. 3 Mod. 15. 3 Bulſt. 78. Moor, 845. 1 Lev. 233. Fitz. 273.

Caſe 15. Browne *againſt* Averie.

The words "*whore*" and "*old whore*" are of ſpiritual cognizance. 1 Roll Abr. 34. Moor, 10. Cro. Eliz. 582. 2 Mod. 296. 1 Sid. 241. Cro. Car. 393. 1 Salk. 404.

PROHIBITION was moved for to the eccleſiaſtical courts for a libel there for the words "*whore*" and "*old whore*," for that in the Common Pleas they conſtantly grant prohibitions in ſuch caſes.

But in the King's Bench they deny it, though an action in *London* lies for thoſe words, (*a*) becauſe the ſuit ſpiritual is only *pro reformatione morum*, and no damages are recoverable there. (*b*) 2 Salk. 691. 696.

A prohibition will not lie after ſentence in the ſpiritual court, if they have juriſdiction in the cauſe.

Beſides that there were two ſentences in the ſuit there, *viz.* one in the conſiſtory court below, and another upon an appeal before the delegates, after which, if they have any juriſdiction, no prohibi-

2 Inſt. 602. 2 Roll Abr. 318. Poſt, 195. 3 Mod. 194. 2 Burr. 813. Cowp. 424. Dougl. 378. 1 Term Rep. 3. 552. 2 Term Rep. 473.

(*a*) The court will not take notice of the cuſtom of *London*, that an action ſhall lie for calling a woman "*whore*," becauſe it has not been certified, Staunton v. Jones, Dougl. 380. *notis.*

(*b*) See the caſes of Cook v. Wingfield, 8 Mod. 176. Stra. 555. Andr. 300. Fort. 347. Held v. Winter, Bunbury, 312. and Carſlake v. Mapledoram, 2 Term Rep. 473.

tion

tion lies. *Smith v. Poynderil, Cro. Car.* 97. After admittance of their jurisdiction there ought not to be a prohibition.

BROWNE v. AVERIE.

Besides, for words * of this nature prohibitions have been denied, as *of* or *to* a woman, "thou art a Welch jade," with an averment that "jade" signifies "whore," and a prohibition was denied, *Pew v. Jeffries*, 1 *Cro.* 457. so for "cuckoldy knave," it has been denied; and so for these words, "old bawd, old whore," it has been denied.

* [26]

And in the principal case it was denied upon solemn debate.

Edgecomb *against* Burdell.

Case 16.

REPLEVIN. There were two tenants in common of the rent of a penny; one of them avows for the third part of a penny, and that *ut in terris districtionis ipsius l'avowant oneratis et obligatis:* demurrer thereto.

An avowry sur-le matter en la terre by one of two tenants in common for the *third part* of a penny rent, is good. S. C. 2 Jones, 138. 9 Co. 135. Ray. 257.

It was urged, that it was ill for the form, as it is resolved in *Dyer* 257. *pl.* 11. for such form is always intended of a rent charge, and here in this case he ought to have avowed upon the tenant *by the manor* and not *upon the land.* And 5 *Hen.* 7. 11. avowry ought to be as *upon the matter*; and in 2 *Hen.* 4. 24. avowry upon tenant for term of life by lease from the avowant for rent reserved upon the lease, he shall not avow upon him as *upon his very tenant*, but as upon his tenant *by the manor*, unless he were tenant of the fee simple or fee tail: and so is *Co. Lit.* 269. *b.* that he ought to avow upon the lessee, *viz. super materiam prædictam in terris et tenementis prædictis ut infra feodum et dominium suum.*

It was urged likewise, that the avowry for the third part of a penny is naught; for that they could not pay it, there being no such coin. Tenants in common may and must join where the rent cannot be divided or severed; as if it be an horse, hawk, &c. and so is *Littleton's text* (*a*) expressly.

On the other side it was urged, that for the form, it was helped by their general demurrer, the want of form not being specially assigned for cause of demurrer. And for the rent, tenants in common may sue severally and avow severally; and this rent is not a *punctum indivisible* as they would have it. It is not like a horse; this has four parts, and they ought to have tendered the farthing, and having so * done would have been well, because no less coin, &c. Judgments have been many times for an halfpenny. (*b*)

* [27]

And in the principal case THE COURT were of opinion that the avowry was well enough; and accordingly judgment was given for the avowant, *nisi causa, &c.*

(*a*) Litt. Sect. 314.
(*b*) See the case of Marsham v. Butler, 1 Roll Rep. 19. and the Year Book, 42 Edw. 3. pl. 7. a.

Dunstall,

Caſe 17. Dunſtall, qui tam, &c. *againſt* Dunſtall.

Quod cum is bad in debt on a penal ſtatute. 2 Lev. 123. 3 Mod. 35. 1 Salk. 371. Ld. Ray. 1363. 1 Burr. 400. 2 Hawk. P. C. c. 25. ſ. 60.

ERROR upon judgment in debt upon the ſtatute of conventicles for twenty pounds.

Errors aſſigned *ore tenus* were,

FIRST, It is all but recital in the declaration by a *quod cum*, ſo that there is nothing laid poſitively, no averment direct that there was a conventicle held or kept. In treſpaſs *quod cum* is naught, though good in *caſe:* ſurely in ſuit upon a *penal law* the charge ought to be poſitive.

The ſtatutes of Jeofails do not extend to actions on penal ſtatutes. Poſt, 144.

SECONDLY, The judgment is here *quod defendens ſit in miſericordia*, whereas it ought to be *quod capiatur*, which is alſo naught; as it is error in a judgment on a *ſcire facias* on a judgment to ſay, *quod recuperet debitum ſuum prædict'*, whereas it ought to be, *quod habeat executionem:* good forms ought to be kept in judgments, and this is not barely informal, for here by this *miſericordia* the king has loſt a fine due to him which he would have had upon the award of a *capiatur*. (*a*)

And for theſe cauſes judgment was reverſed. (*b*)

(*a*) By 5 & 6 Will. & Mary, c. 12. no writ of *capias* ſhall iſſue for this fine. See 3 Bl. Comm. 398. 1 Salk. 54. Carth. 390.

(*b*) By 16 & 17 Car. 2. c. 8, "no judgment after verdict, *cognovit actionem*, or *relicta verificatione* ſhall be reverſed for want of a *miſericordia* or *capiatur*, or by reaſon that a *capiatur* is entered for a *miſericordia*, or a *miſericordia* for a *capiatur*." But this act does not extend to any action popular or any other action upon a penal ſtatute except debt, for not ſetting out tithes. By 4 Ann, c. 16. it is extended "to judgments by *nihil dicit* or *non ſum informatus*, and to all ſuits for recovery of any debt immediately owing, or any revenue belonging to the crown;" and by 9 Ann, c. 20. ſ. 7. to "all writs of *mandamus* and informations in the nature of *quo warranto*." By 4 Geo. 2. c. 26. ſ. 4. all the ſtatutes of Jeofails whatſoever are extended to all proceedings in courts of juſtice, except in *criminal caſes:* and in Middleton v. Wynne, on a judgment on 7 & 8 Will. 3. c. 7. for *double* damages for a falſe return, it was aſſigned for error that a *miſericordia* was entered inſtead of a *capiatur*, and the Court doubted whether the judgment was, for this reaſon, erroneous, but agreed that if it was wrong, it was amendable becauſe this was not a *criminal caſe*. cited in Alcheſon v. Everet, Cowp. 387. See alſo Sedgwick v. Richardſon, 3 Lev. 374; Philips v. Smith, 1 Stra. 136. Tully v. Sparkes, 2 Stra. 867. Richards v. Brown, Dougl. 113. and Goff *qui tam* v. Popplewell, 2 Term Rep. 707. and 5 Geo. 1. c. 13.

Caſe 18. Prideaux *againſt* Rawlins.

A declaration on a promiſe in conſideration the plaintiff would diſcharge a third perſon is good, without ſhowing how the diſcharge was given.——S. C. 2 Jones, 125. 1 Sid. 177. 2 Leon. 214. 3 Lev. 237. 1 Mod. 206. 262. 2 Mod. 44.

ERROR upon a judgment in caſe upon a promiſe, which was to pay the plaintiff ten pounds if he would diſcharge J. S. of ſuch a proceſs, and alledges in his declaration, that he did diſcharge him; but ſhews not how, whether by releaſe or otherwiſe.

Exception

Exception to the declaration was now taken in this matter, in the writ of error.

PRIDEAUX v. RAWLINS.

For the plaintiff in the writ of error was urged the case of *Leveret v. Remit*, *Cro. Jac.* 503. in the like case the declaration was held * ill, because the consideration was not alledged to be well performed, not shewing how.

* [28]

But on the other side was alledged the case of *Langden v. Stokes*, (*a*) which was a later authority and directly the contrary.

And therefore THE COURT here in the principal case held it to be well enough, especially being *after verdict*. Perhaps it would have been otherwise upon *a demurrer* to the declaration; saying also, that in former times they were more nice and curious in actions of the case than of later days, wherein they have grown so common.

And the judgment was affirmed.

(*a*) Cro. Car. 383.

Absor *against* French. Case 19.

TRESPASS. The defendant pleads, that there was a *highway* from such a place to such a place; that the plaintiff stopped the same so as he could not pass, and therefore he went over the plaintiff's close, doing as little harm as he could.

If a highway be foundrous, a passenger may go over the next adjoining land.

S. C. 2 Lev. 234. 1 Roll Abr. 390. Cro. Car. 366. N. Lut. 396. W. Jones, 296. 1 Hawk. P. C. ch. 76. s. 2. 3 Bl. Comm. 36. 1 Com. Dig. "Chimin," (D 6.)

And HELD GOOD upon *demurrer*; for if the way be so foul as is not passable, I may then justify the going over another man's close next adjoining.

Judgment for the defendant. (*a*)

(*a*) See the case of Taylor v. Whitehead, Dougl. 744.

Seaton *against* Henson. Case 20.

Hilary Term, 28 & 29 *Car.* 2. *Roll* 579.

DEBT on a bond. The case was, four persons were bound in a bond jointly and severally, and did each of them seal and deliver the same. The seal of one was broken off. The obligee sues the defendant whose seal was still affixed to the bond. He pleads the special matter and concludes *non est factum*.

If three persons seal and deliver a joint and several bond, the tearing of the seal of one of the obligors intirely destroys the bond.

S. C. 2 Lev. 220. 1 Mod. 11.

The question was, if the bond hereby became void as to all the obligors, or only to him whose seal was torn off?

MR. SAUNDERS urged for the defendant, that though the obligation be joint and several, yet it is but one entire debt, and therefore

SEATON v. HENSON.

* [29]

Vide Manchester College v. Trafford, poſt, 31.

fore it is now become void as to all; * for otherwiſe it would be at the election of the creditor to make one free, and the other not. The caſe of *Matthewſon v. Lydiate*, (*a*) was a caſe of ſeveral covenants which was as much as ſeveral deeds written within one and the ſame parchment; but in this caſe it is one intire obligation: he urged the caſe of *Bayly v. Garford.* (*b*) Three bound in a bond jointly and ſeverally, the ſeal of two are eaten by the rats and mice, the bond adjudged void as to the third; and this is the ſame with an interlineation or raſure; for now it was not the ſame as it was before, it was a joint as well as ſeveral obligation; he inſiſted on *Co. Lit.* 232. where a releaſe to one obligee may be pleaded in bar by the other.

And thereupon THE COURT did all incline for the defendant, that the bond was void as to all, it being by his own laches.

Judgment for the defendant *niſi cauſa*, &c. (*c*)

See *Michael's caſe*, *Owen*, 8. Two bound, and after iſſue joined, and before the *niſi prius*, the ſeal of one is broken off; agreed, that had it been before iſſue joined it would have avoided the bond; and ſee the caſe of *Michael v. Stockwith* in *Dyer* 59.

(*a*) 5 Co. 22.

(*b*) March. page 125. pl. 205.

(*c*) The Court at firſt doubted, but afterwards, upon the authority of Bayley v. Garford, March. 125. as ſtated above, gave judgment unanimouſly for the defendant, S. C. 2 Lev. 220. See the caſe of *Michael v. Stockworth* and *Andrews*, where in debt on bond, the jury found that the defendants ſealed and delivered the bond as their deed, and that after iſſue joined, and before the *niſi prius* the ſeal of *Andrews* was taken from the bond, and it was adjudged a good bond, Owen, 8; for it was the defendant's deed at the time when the iſſue was joined, and the trial ſhall relate to it, although the deed was cancelled afterwards, S. C. Cro. Eliz. 120. but it was agreed that had it been broken off before iſſue joined it would have avoided the bond, *vide ſupra*; and therefore in the caſe Nichols v. Haywood, where the ſeal was broken from the bond on which the action was brought, the jury by the opinion of all the judges were charged to enquire whether it was the defendant's deed at the time the plea *non eſt factum* was pleaded, Dyer, 58.

* Hilary Term, * [30]

The Thirtieth and Thirty-firſt of Charles the Second,

IN

THE KING's BENCH.

Sir WILLIAM SCROGGS, *Knt. Chief Juſtice.*

Sir WILLIAM WYLDE, *Knt.*
Sir THOMAS JONES, *Knt.*
Sir WILLIAM DOLBEN, *Knt.* (*a*)
} *Juſtices.*

Sir WILLIAM JONES, *Knt. Attorney General.*

Sir FRANCIS WINNINGTON, *Knt. Solicitor General.*

The King *againſt* Stanton.

Caſe 21.

An *information* lies for cutting down the banks of a public river, and thereby diverting the courſe of the water, although that part of it is by act of parliament veſted in private perſons, and *an action* given them for damages done to it. ——— Poſt, 243. 249.

INFORMATION for cutting down the banks of the *river Wye*, whereby the watercourſe was inverted.

It was urged, that this river and the cutting of the ſoil was ſettled by act of parliament in the fifth year of queen *Elizabeth*, and that by that ſtatute *an action* is given, it being by the act made a private intereſt, and therefore they would have no *information* to lie; for by the ſpecial verdict it is found to be made a *navigable river* by the act, (*b*) and therein are new remedies thereby provided; ſo

(*a*) SIR THOMAS TWISDEN, knight and baronet, to whoſe place SIR WILLIAM DOLBEN ſucceeded, was not diſcharged from his office, but his attendance on the duties of it was diſpenſed with by reaſon of his age and infirmity, and he was allowed a penſion of £. 500 a year from the crown: he died in the month of January 1682, at his ſeat in the county of Kent. Ray. 475.

(*b*) The rivers *Wye* and *Lugg* are made navigable by the ſtatutes 7 & 8 Will. 3. c. 14. and 13 Geo. 1. c. 34. and ſee 6 Geo. 2. c. 37. and 4 Geo. 3. c. 12. ſ. 5; by which the offence of maliciouſly cutting the banks of any river made navigable by act of parliament is declared to be felony.

that

KING v. STANTON.

that they were excluſive of all others. An affirmative ſtatute concerning any thing that was not at the common law, implies a negative of all other things. And in *Cro. Jac.* 644. *Caſtle's caſe*, it was reſolved, that when a ſtatute appoints a penalty for any thing that was not an offence before, and preſcribes how it ſhall be recovered, the party ſhall be puniſhed that way and not by indictment; and in our caſe by the ſtatute they are to have treble damages, and therefore not to be puniſhed by indictment or information; for then they might be puniſhed both ways. (*c*)

MR. POLLEXFEN *e contra* for the king. There may be damages to the party grieved, and yet an indictment too, as in caſe of forcible entry, the remedy of the party at common law is not taken away by affirmative * ſtatutes. In *Caſtle's caſe* the fact was no offence before the ſtatute, but here it was. An *indictment* and *action* will lie for a nuiſance, though in a private man's ſoil; and ſo for a treſpaſs *vi et armis* in a private man's houſe, both action and indictment lie. (*d*)

* [31]

And judgment for the king by THE WHOLE COURT.

(*c*) See 2 Hawk. P. C. ch. 25. ſ. 4. *notis*; and Rex v. Marriot, 1 Shower, 398.

(*d*) Rex v. Robinſon, 2 Burr. 799. Rex v. Harris, 4 Term Rep. 202. 400. *notis*.

Caſe 22. Mancheſter College *againſt* Trafford.

If a leaſe be made for twenty-one years with a further covenant by the leſſor, "that "the leſſee "ſhall have "the ſame for "21 years "more after "the expiration of the "ſaid term, and "ſo from 21 "years to 21 "years until "99 years "*thence* next "enſuing ſhall "be complete "and ended," the firſt 21 years ſhall not be reckoned part of the 99 years.

S. C. 2 Lev. 241.
2 Peer Wms. 196.
Cowp. 821.
1 Term Rep. 229.

ERROR on judgment given on a ſpecial verdict in the Common Pleas, where the caſe was, A. leaſes tithes to B. "to "have and to hold to the end and term, and for and during the time "of twenty-one years from the date, fully to be complete and ended; "AND IT IS FURTHER COVENANTED and agreed by and between "the ſaid parties, that the ſaid *A.* doth covenant and grant to and "with the ſaid *B.* that the ſaid *B.* ſhall have the ſame for one and "twenty years more after the expiration of the ſaid term, and ſo "from one and twenty years until ninety-nine years be complete "and ended."

The queſtion was, whether the firſt twenty-one years ſhall be included in the ninety-nine years?

PEMBERTON *Serjeant* for the plaintiff. The intention of the parties is here to be looked after. The words "and ſo" ſeem to refer to both, even to the firſt twenty-one years. Then there is a condition of re-entry for non-payment of rent after all, which muſt be referred to all the terms, and extend to the firſt twenty-one years. The chief doubt is upon the words "covenant and grant," which are mentioned again after the firſt term for twenty-one years; but the whole contexture ſeems to be only, that the party ſhould have ninety-nine years in all and no more; now if they be two leaſes and the clauſe of re-entry extend to both, then the condition will be ſuſpended during the ſaid term.

DOLBEN *Juſtice.* The words "from thence next enſuing," may be referred to the beginning of the firſt term, or to the end of it. MANCHESTER COLLEGE *v.* TRAFFORD.

SCROGGS *Chief Juſtice* ſaid, that therefore, it ſtanding ſo indifferent, we ought to conſtrue it moſt ſtrongly againſt the grantor.

*WYLDE *Juſtice.* A leaſe of a future entry does not toll an entry as the grant of a reverſion will; and in this caſe it is only a future intereſt. *[32]

And therefore the judgment was affirmed; and the leaſes adjudged to be good; and to be two leaſes, and not one, *viz.* for twenty-one years, and for ninety-nine years beſides.

Hinton *againſt* Wilmore. Caſe 23.

DEBT on a bill under ſeal to pay five hundred pounds and intereſt, until the defendant took up the note. The plaintiff demanded in his declaration the five hundred pounds only. Demurrer thereto.

In debt on bond to pay £. 500 and intereſt, a declaration for the £. 500 only, without demanding the *intereſt*, is good.

And it was ſaid by the defendant's counſel, that the plaintiff could not ſue for the *principal* without the *intereſt*, and that he could not divide them.

BUT HELD to be well enough, for that the direct obligation was to pay the five hundred pounds.

And judgment was given for the plaintiff.

Scoble *againſt* Lee. Caſe 24.

CASE for theſe words, "thou art a regrator, and didſt regrate by ſelling at twelve ſhillings when thou boughteſt at ten ſhillings.

To ſay, "thou "art a regrator, "and didſt re- "grate by ſel- "ling at 12 *s.* "when you "bought at "10*s.*" is not actionable.

But on a motion in arreſt of judgment the words were held not actionable; the thing not being a *malum in ſe*, nor carrying a ſcandal in it, nor importing any crime that expoſed to loſs of life or limb; (*a*) and theſe words are no more actionable than to ſay, "thou "haſt built a cottage and not laid out four acres thereto. (*b*)

1 Roll. Abr. 43. 68.
Moor 29.
1 Show. 181.
Cro. Jac. 204.

Judgment for the defendant.

(*a*) The ſtatutes againſt foreſtalling, regrating, and ingroſſing, are repealed by the ſtatute 12 Geo. 3. c. 71. See 1 Hawk. P. C. c. 80. ſ. 11.

(*b*) By 31 Eliz. c. 7. it was enacted, that no perſon ſhould erect a cottage, unleſs he laid to it four acres of freehold land of inheritance, on pain of £. 10 for its erection, and 40 *s.* a month for its continuance: but by 15 Geo. 3. c. 32. this ſtatute is repealed.

* Eaſter Term,

The Thirty-firſt of Charles the Second,

IN

THE KING'S BENCH.

Sir WILLIAM SCROGGS, *Knt. Chief Juſtice.*

Sir THOMAS JONES, *Knt.*
Sir WILLIAM DOLBEN, *Knt.*
Sir FRANCIS PEMBERTON, *Knt.*
} *Juſtices.*

Sir WILLIAM JONES, *Knt. Attorney General.*

Sir FRANCIS WINNINGTON, *Knt. Solicitor General.*

Memorandum.

IN the beginning of this *Eaſter* Term, JUSTICE WYLDE was removed, and MR. SERJEANT PEMBERTON ſworn Judge in his place at the Lord Chancellor's houſe.

WYLDE *Juſtice* removed.

Goodwin *againſt* Browne. Caſe 25.

CASE for theſe words: "You are a forſworn blade, and you "are forſworn in your anſwer, (*a*) that the land in ſuch a "place was purchaſed in my daughter's name."

The queſtion was, if actionable; becauſe it was not alledged that the cauſe was *within the juriſdiction* of the court where the anſwer was?

An action for ſaying "you are "forſworn in "your anſwer," is good, without alledging that the cauſe was within the juriſdiction of the court in which the anſwer was.——Poſt 246. 1 Danv. 86, 91. 136. 3 Inſt. 166. N. Lut. 410. Latch. 31.

(*a*) Jones v. Herne, 2 Will. 87.

Goodwin v. Ergwue.

Pemberton *Justice*. The action lies though the oath be in a court which has not jurisdiction for the scandal is the same.

Jones *Justice* said, A man cannot be indicted for perjury in a cause out of the jurisdiction of the Court where the oath is.

Dolben *Justice*. If it appear upon record, that it is out of their jurisdiction, it is all *coram non judice*, and no perjury lies: *Sharpe's case*. *Cro. Car.* 352. proves it.

Yet at last the declaration was held good, and judgment given for the plaintiff.

Case 20.

* Hill *against* Hour.

* [34]

A toll in *Penzance market*, belonging to THE CROWN in right of the dutchy of *Cornwall*, is not discharged by a grant from THE CROWN exempting the inhabitants of *Penzance* "from all and "all manner of "toll, pontage, "stallage, &c. "all which "king *John* "had granted "to them to be "discharged "from;" for king *John* never had the toll which belonged to the crown in right of the dutchy; but if the grant had been general, without referring to the tolls which the kings of *England* formerly had in this market, it would have been a good grant of exemption.

TRESPASS.[1] The defendant pleads as to all, except to the taking one quart of oatmeal, not guilty; and as to the rest he justifies the taking thereof as *toll* in *Penzance market*, which has been always paid time out of mind to THE DUKE or to THE KING in the right of the *dutchy of Cornwall*.

The plaintiff replies, that *queen Elizabeth*, being seised of the manor and markets, did, by letters patens, discharge the inhabitants of *Helston*, in *Penzance*, and gave them a perpetual exemption *ab omni et omnimodo theolonio, pontagio, stallagio* and several other sorts, even all which *king John* and *king Richard* the Second had granted to them to be discharged from.

The defendant rejoins, that the said toll had been always received time out of mind, and the inhabitants of *Helston* had constantly paid the same.

Demurrer thereto, for that they ought to have rejoined specially the patent of discharge, either by traversing or avoiding it.

It was urged, that the replication was ill, and that the grant of *king John* could not avoid the toll, being by prescription in the dukedom of *Cornwall*; and that the queen's grant reciting the former should not enlarge it.

Saunders on the other side argued, that the queen being seised of the toll, and having an interest therein, had liberty to discharge the same without wronging any person. He confessed, that the word "stallage" would not include toll; but the word "*theolonium*," toll, included stallage, piccage, and toll, &c. as a *genus* doth its several *species*.

Mr. Pollexfen at another day argued for the plaintiff, that a grant from the king to be quit of toll in general is void for the uncertainty, because there are so many several sorts and kinds of it: here are in the patent divers particulars mentioned, and therefore *theolonium* shall never include this sort of toll for a market; for then

1 Roll. Abr. 196. 186. 2 Jones 207. Dyer 362. 8 Co. 46. Moor 321. 427. 46. Hard. 499. 9 Co. 131. N. Lut. 357. 422. 443. 488. 835. 1 Co. 44. 50. 3 Lev. 135. 1 And. 2 Bac. Abr. 459.

the

the queen would be deceived in her grant, "*theolnium*" being a general word, and ſeveral particulars being named after it: therefore it can be only intended to be by way of *videlicet* as from all ſorts of toll, *to wit*, ſtallage, piccage, &c. Beſides, * whereſoever the words are any way ambiguous, the conſtruction ſhall be in favour of the king: alſo here the queen has a market, and tol as ſeignioreſs of a manor, which ſhe has by diſcent in right of the *autchy of Cornwall*, and this is not mentioned; ſo that one queſtion vill be, whether a general grant ſhall paſs away that which ſhe has: particular intereſt in? She grants no more than king *John* had; now this particular intereſt deſcended to her from the *Duke of Cornwal:* and he cited the *caſe of Torrington market* in *Dyer* 276, 277. and alſo the *caſe of the Dutchy of Cornwall*, *Dyer* 268. And further urgel, that the word "*theolonio*" will not be conſtrued for all toll, but hall be conſtrued and reſtrained by the later words, the ſeveral particular kinds.

Hill v. Paiour.

* [35]

Mr. Saunders *è contra*. It is a grant of exemption both from toll and pontage, &c. elſe there need not have been a ſubſtantive precedent, but "*ab omni pontagio*" would have been good; and according to the ſtrict ſenſe of the word "*theolonium*" as it is in Rastall's "Terms of the Law," it ſignifies a particular toll for goods bought and ſold in a market: there is a great diverſity between a grant to diſcharge a man from paying toll, and a grant of toll; for in the latter there ought to be a greater certainty and a more particular recital, becauſe a new thing is granted; but a grant to be diſcharged of toll, whether in a new market or an old one, is all alike; and according to their objection this could not have been good except it had taken particular notice of all the markets in *Cornwall*, and it is not a confirmation but a grant, for it does not ſay, "the privileges above granted," but "*prærecitata*." It is by the word "*concedi-*" "*mus*." This is not the uſual form and way of confirmation; ſhe cannot paſs the intereſt of another, and therefore it muſt be of ſomewhat belonging to herſelf.

The Court. The grant will not be void if we ſhould judge for the defendant: for all the other markets in *Cornwall*, will they be exempted from toll, and this not, becauſe the queen came to have it by the duke of *Cornwall*, and king *John* never had it? Now the queen's particular intereſt is not recited at all: as to the words "*ſtallagium*," Spelman ſays, it includes toll for * ſhewing goods in a market; *theolonium* is a barbarous word, and derived from Τέλος and Τελώνης, receivers of tribute.

* [36]

Pemberton *Juſtice* ſaid, It had been good if general without recital, becauſe it would and ſhould have paſſed what the queen had; but here it refers to king *John*, and he never had this.

Scroggs *Chief Juſtice*. The queen only paſſed thoſe tolls which belonged to the kings of *England*, particularly which king *John* had, and not thoſe which came to her ſince, and by another means.

To which the reſt agreed.

And judgment was given for the defendant.

Case 27. The King *against* Medlor.

The keeping of *a cockpit* is indictable as a *nuisance* at common law; and *cock-fighting* for *lucre* in a common gaming house, is an unlawful game within the 33 Hen. 8. c. 9. f. 11.
3 Keb. 465. 510. 2 Roll. 79. 11 Co. 87. b. 10 Mod. 336. 337. Cowp. 39.

INDICTMENT for keeping and suffering the unlawful game of *cock-fighting* in his house *per vigint' dies*, for the getting lucre and gain to himself thereby.

Motion in arrest of judgment, that it was no unlawful game.

And then BY THE COURT was remembered the opinion of the Lord Chief Justice *Hale*, that it was a public nuisance, not for the unlawfulness of the thing itself, but for keeping houses to decoy idle persons and apprentices, and consequently it becomes a means of debauching the youth of the nation; it must be done for *lucre-sake*, it must be often and not once only; but the forfeiture is forty shillings a day.

And ALL THE COURT severally gave their opinions, that such *cock-fighting* was an unlawful game, and prohibited by the law.

And judgment was given for the king.

Case 28. Freak *against* Lee.

Trinity Term, 28 *Car.* 2. *Roll* 987.

A man having lands of £. 10. a year in possession, and £. 30. a year in reversion expectant upon an estate for life, bequeaths £. 180 in different legacies to be paid out of his lands within two years after his decease, and devises his lands generally without any limitation of estate to his nephew; the nephew takes an estate *in fee*, not on *condition* that he pays the legacies within the two years, but *in trust* to pay them.——S. C. 2 Jones 113. S. C. 2 Lev. 249. S. C. Pollexf. 553. Post 49. 1 Roll. Abr. 834. 2 Lev. 162. 6 Co. 16. 2 Jones 107. 137. 1 Mod. 189. 1 Lutw. 762. Lutch. 9. 39. 2 Mod. 25. Cro. Eliz. 204. 2 Vern. 106. 1 Chan. Cas. 106. Fort. 58. Stra. 798. 2 Atk. 71. 2 Bl. Rep. 1045. 1215. Cowp. 43. 299. Dougl. 730. 3 Term Rep. 356. 4 Term Rep. 89.

EJECTMENT. Special verdict. *A.* seised of lands in fee makes his will, and therein gives his cousin *B.* twenty pounds to be paid out of his lands within one year. ITEM, Twenty pounds to, &c. to be paid within two years after his decease, and fifty pounds more to, &c. to be paid out of his lands within two years. ITEM, Fifty pounds to *B.* out of his lands when he shall come of age. Then he gives all his lands to *Richard* generally. Then it is found, • that there were but ten pounds a year in possession, and thirty pounds a year in reversion expectant upon an estate for one life. The testator dies. The eldest son and heir enters. Then the devisee *Richard* dies, and his son enters, and the heir brings his ejectment, *et si, &c.*

The question on the whole was, what estate *Richard* had by this devise, whether in fee or only for life?

IT WAS ARGUED for the heir, the lessor of the plaintiff, that *Richard* had but an estate for life; the legacies not being to be paid by *Richard*, but out of the lands, into whose hand soever the lands should come. They agreed the case of *Wellock v. Hammond*

cited

cited in *Boraſton's caſe* (*a*) and reported in *Leonard* (*b*), but urged, that here is no perſon limited to pay the legacies, nor is the non-payment made by the will to be a forfeiture or determination of the eſtate deviſed; but only in equity, the legacies are to be paid out of the profits of the land. Beſides that, here is nothing in the will from whence it can be imagined to be the intent of the teſtator utterly to ouſt his heir at law: and the caſe of *Taylor v. Sayer* (*c*) was cited, as likewiſe the caſe of *Wilkinſon v. Merryland* (*d*), where it was adjudged, that by a deviſe of *all his eſtate* no fee paſſed. (*e*)

E contra, it was argued, that here was an hundred pounds to be paid out of theſe lands in two years time; and who ſhould pay them? The deviſee could not, if he ſhould have it but for life; for the land is but ten pounds *per annum* in poſſeſſion; and the deviſee may die before the two years are out; and the heir is not bound to pay it: in *Collier's caſe* (*f*) where the deviſe was, that it ſhould remain to the brother, paying to one twenty ſhillings, and to others divers ſeveral ſums, amounting in all to forty-five ſhillings, and the land was three pounds *per annum* in value, it was adjudged a fee ſimple; and ſaid if it had been out of the profits of the land, it would have been otherwiſe (*g*); but as that caſe was, and as this caſe is, the deviſee may pay the legacies, and after payment he may die before ſatisfaction made to himſelf out of the lands bequeathed, unleſs a fee be given him, and a power to ſell.

* JONES *Juſtice*. It is as much and all one, as if the deviſor had ſaid, "I give my land to the defendant, he paying ſo much money," and there it is a condition; now here in this verdict, it is found that the legacies are not paid; and therefore the condition is broken, and the entry of the heir is lawful. * [38]

PEMBERTON *Juſtice*. A bill in chancery might have been brought againſt the deviſee and heir, and ſo the lands would have been forced to be ſold.

DOLBEN *Juſtice*. The deviſee can have no profit by the deviſe, if it be but for life: if it were out of the profits of the lands, equity

(*a*) 3 Co. 20.

(*b*) 2 Leon, caſe 152. S.C. Cro. Eliz. 204.

(*c*) The caſe of Taylor v. Sayer was, "I deviſe my lands to my wife for life, and "after her death, the ſame ſhall remain to "my iſſue;" and it was found the teſtator has two ſons and two daughters, and the remainder was held void for uncertainty. Cro. Eliz. 742. But this caſe is denied to be law in the caſe of Bate v. Amherſt, Ray. 83. See alſo Loddington v. Kime, 3 Lev. 431. 1 Salk. 224.

(*d*) The teſtator, in the caſe of Wilkinſon v. Maryland, was ſeiſed of divers lands in three different places, and the lands in one of the places were mortgaged to him and forfeited, and it was held that a deviſe of "all my goods, chattels, leaſes, eſtates, "mortgages, debts, &c." did not paſs a fee in the mortgaged premiſſes, Cro. Eliz. 447. becauſe by the words it appeared that he only intended to paſs things perſonal, or leaſes whereof he was *poſſeſſed*, and not freeholds, whereof he is ſaid in law to be *ſeiſed*, S. C. Cro. Eliz. 450. But ſee Hurſt v. Earl Winchelſea, 2 Burr. 880.

(*e*) That *a fee* paſſes by a deviſe of "all "my eſtate." See Moor 873. 1 Roll. Abr. 835. 1 Mod. 100. 2 Lev. 91. 3 Mod. 45. 1 Salk. 237, 1 Vezey 226. Ambler 387. Ld. Ray. 1324. Caſes, T. T. 284. 3 Peer Wms. 295. 2 Bl. Rep. 889. Cowp. 352. 657. 1 Term Rep. 411. 2 Term Rep. 656. 4 Term Rep. 93.

(*f*) 6 Co. 15.

(*g*) See 1 Eq. Caſ. Abr. 199. and Doe on demiſe of Palmer v. Richards, 3 Term Rep. 356.

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cannot help to a payment; but if out of the land, then the land is charged, and it ſhall be ſold.

THE COURT inclined that it was a fee.

Sed Adjornatur.

But *quære*, if it were a condition, as MR. JUSTICE JONES would have it; for if a fee, it ſeems to be a condition; for otherwiſe there would be no legal means to compel a payment of the legacy; all the remedy would be in equity: but this point was not moved by the counſel that argued it at this time, the plaintiff's counſel thinking their caſe well enough, in that the deviſe could be but for life as they argued; and the defendant's counſel inſiſted only how to anſwer the other's objections.

MR. GOULD, in Trinity Term following, argued for the plaintiff, and he raiſed both the queſtions.

FIRST, What eſtate the deviſee has?

And SECONDLY, Whether it be in truſt or upon condition?

For THE FIRST he agreed, that according to *Collier's caſe* above-cited (*b*) had it been a deviſe of the lands to *Richard*, paying ſo much money, it would have been a fee ſimple; and ſaid, that he granted that to them of the other ſide, and that they muſt grant to him, that if theſe legacies were bequeathed out of the iſſues and profits of the land, it would be certainly but an eſtate for life; then ſuppoſing it fell out, that the profits would not pay the legacies in the time, yet he took it, "out of the land" and "out of the profits of the land," to be the ſame thing; for if a man grant the profits the land paſſes; and a *levari facias* is *de terris*, and yet reaches but the profits, &c.

* [39] * Then SECONDLY, The queſtion is, whether they being to be paid within ſuch a limited time will alter the caſe? He urged, that it was only to be paid within ſuch a time, if poſſible, if the caſual profits happened to be ſufficient; and this ſenſe, he argued, was both natural and reaſonable; natural becauſe it is a debt charged upon the land, and then you muſt take it as the land will pay it; it is reaſonable, for the deviſing part is giving the legacy, the other is but a circumſtance of time as to the payment, &c: poſſibly it may happen that the profits of the lands may diſcharge theſe legacies, as if the reverſion fall preſently; for one of the fifty pounds is not charged upon the land, but only to be paid generally. In caſe of a deviſe "to J. S. paying, &c." it is but of late years that that has been reſolved a fee ſimple; for in the caſe of *Bacon v. Hill*, (*i*) the contrary is ruled, that "paying, &c." ſhall not make a fee ſimple: but the payment was intended for the ſame eſtate which was deviſed; and to the ſame purpoſe he cited the caſe in *Dyer* 371. *pl.* 5. where the father tenant for life, remainder in fee to the ſon, the ſon deviſed

(*b*) 6 Co. 16. (*i*) Moor, 464.

the

the land which he had or might have in reverſion after the death of his father, to his wife, yielding and paying during her natural life forty ſhillings rent *per annum*, to the right heirs of his father, and dies, living the father; and it was ruled, that no eſtate paſſed by this deviſe to the wife but for term of her life, and that the payment of the rent ſhould not begin until the remainder fell after the death of the father, inſomuch that he has no right heir during his life. And as to its being a condition, he cited *Mary Portington's caſe* (*k*) and the caſe in *Dyer* 163. *pl.* 52. where the words were not "paying" but "in truſt, and for the intents and purpoſes following, ITEM, "I will, and my will and intent is, that out of the rents and "profits, *&c.*;" and the judges all inclined that it was a condition in that caſe. FREAR v. LEE.

MR. SAUNDERS argued on the other ſide, ſaying, that as to THE FIRST POINT he thought they had reſolved it the laſt term; and that the only doubt had been about its being a condition; for who ſhould pay thoſe legacies'; the heir will not, for the land is * given away from him: if the deviſee be bound, it is more than the profits can amount unto; therefore he muſt have a power to ſell, and conſequently a fee, elſe inſtead of having an advantage, he will have a prejudice by the deviſe. As for that fifty pounds which is to be paid generally, he ſaid, that the land is chargeable therewith, for the ITEMS both before and after it are to be paid out of the land; therefore if the reverſion ſhould have fallen, the profits would not pay the legacies; and it is very unlikely that the teſtator ſhould ſuppoſe the tenant for life would die within a year after him. * [40]

AS TO THE OTHER QUESTION, there are no words to make it a condition, but it is left wholly to a conſtruction upon the deviſe. If it ſhould be a condition, then upon the firſt failure of the firſt payment, the heir might enter, and alien before the ſecond time of payment comes: and the purchaſor having no notice of the legacies (he buying of one that is heir at law) would not be liable at common law, and ſo you muſt run into chancery, and certainly there they would give you more remedy againſt the deviſee than againſt the heir; now no ſale by the executors or deviſees can bar the legatees, becauſe the purchaſor is bound to take notice of all the charges and incumbrances laid upon the land by the will, for they muſt come in and derive their title by the will; ſo that the ſame means they have to know their title, they have to know the incumbrances and charges. In the caſe of *Martindale v. Martin*, (*l*) where a leſſor deviſed his land to his leſſee for years, for the ſame term he had before, paying the ſame rent at the ſame days, and under the ſame covenants which were in the former leaſe; it was adjudged that it was not a condition, but only a covenant, or rather a truſt.

SCROGGS *Chief Juſtice*. Though *lands* and *profits of lands* do ſometimes ſignify one and the ſame thing, yet not always; therefore we cannot conclude from that, that it is out of the profits;

(*k*) 10 Co. 38. (*l*) Mich. Term, 34 Eliz. Cro. Eliz. 288.

it

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it is plain, he meant two things, firſt to have ſo much money paid, and then ſecondly, within ſuch a time. He * ſaid, that the contingency of reverſions falling ſeemed to him to ſignify nothing; for the teſtator could not be ſuppoſed to ground his deviſe upon that ſuppoſition; and ſuppoſe it ſhould have fallen within a year after his deceaſe, the profits of the land, as the verdict hath found them, could not anſwer the legacies, for he conceived certainly that the fifty pounds generally given, being ſo placed, ſhall be charged upon the land: and therefore he thought it a fee ſimple.

* [41]

As to THE SECOND POINT about the condition, he conceived what MR. SAUNDERS urged to be very material; and much better for the legatees to have the lands liable upon *a truſt* than upon *a condition*, and better to ſend them to equity againſt the deviſee than againſt the heir; and therefore he reſolved it to be a fee and a truſt.

JONES *Juſtice*. Though the circumſtances of time ſhall not avoid the ſubſtance of a deed or will, yet being a circumſtance, it may and does explain the intention of that ſubſtance: as to THE SECOND QUESTION, he ſaid he did ſomewhat doubt, for that it was moſt certain, that words which ſeem to be of leſs compulſion than thoſe in the will in queſtion, will ſerve to make a condition in a will, which will not in a grant; it is in vain to cite caſes, none can deny it. *Crickmere's caſe*, (*m*) is, in this point, expreſs. A man ſeiſed of lands has iſſue two daughters, A. and B. and deviſes all his lands to A. and her heirs, to pay to B. a ſum of money at a certain day and place; the money was not paid; and held, that theſe words, "to pay, &c." did, in a will amount to a condition; and the reaſon was that the land was deviſed to A. for that purpoſe; otherwiſe the party to whom the money was appointed to be paid, would be remedileſs: MR. SAUNDERS's objection is equally againſt that caſe as againſt this, there it is ſaid, ſhe had no remedy at law, and we are not to judge of remedies in equity.

DOLBEN *Juſtice*. That it is a fee ſimple none can doubt, and why it ſhould be a condition, I can ſee no reaſon: the caſe in *Co. Lit.* I have ſeen and read, and in caſe there were any remedy at law againſt the heir after * his entry, I ſhould agree thereto; but there is none; in equity there is; and ſince the legatees are forced thither both againſt the heir and deviſee, they may expect more favour in chancery againſt the deviſee than againſt the heir.

* [42]

PEMBERTON *Juſtice*. It is clear the teſtator intended a fee ſimple ſhould paſs; for every deviſe is preſumed in kindneſs to and for the advantage of the deviſee.—For the other queſtions there is no great reaſon in the will to ſhew that he intended the eſtate ſhould be conditional; it is plain, we do and may take notice of equities, for the chancery is a court known and ſettled by the common law; and though, in a ſtrict ſenſe, it be diſtinguiſhed from the common law which we uſe here in theſe courts, yet it is the common law that

(*m*) Co. Lit. 236. S. C. 1 Roll Abr. 410.

allows

allows of ſuch proceedings by equity; therefore he conceived it a truſt.

FAZAR v. LEE.

SCROGGS *Chief Juſtice.* The reaſon why ſuch ſmall matters ſhall make a condition in a will, is in favour of legatees; and there is much more favour allowed them in this conſtruction than in the other.

Judgment for the defendant. (*n*)

(*n*) Pollexfen in his report of this caſe ſays that judgment was given for *the plaintiff*, Pollexf. 559; but this ſeems to be *a miſtake*; for S. C. T. Jones, 114 and S. C. 2 Lev. 249. agree that judgment was given for *the defendant*; and Pollexfen agrees with Jones that the judgment was afterwards affirmed in the Exchequer Chamber.

Collop *againſt* Brandon. Caſe 29.

Hilary Term, 29 & 30 *Car.* 2. *Roll* 1102.

SCIRE FACIAS to receive a judgment. The defendant pleads a plea in abatement, *viz.* that there was another *terre-tenant* of part of the lands of the conuſor at the time of the writ purchaſed: the plaintiff replies, that there was no ſuch terre-tenant, *et de hoc ponit ſe ſuper patriam.* The defendant demurs.

To a *ſcire facias* againſt *terretenants* to have execution of lands; A PLEA in abatement that there was another *terretenant* of part of the lands is not *peremptory*; and there ſhall be a *reſpondeas ouſter* after demurrer to an iſſue of fact.

S. C. 2 Jones, 122. 2 Vent. 104. Clift. 672. N. Lutw. 402. Yelv. 112. Moor, 524. Cro. Jac. 506. 1 Bac. Abr. 15. 2 Saund. 8. 23. Salk. 4. 601. Cowp. 728.

WESTON *Serjeant* comes and moves for final and peremptory judgment; and makes a diverſity between a *ſcire facias* and an *original* in this caſe, and cites the ſtatute of *Weſtminſter* the ſecond, cap. 45. in 2 *Inſt.* 470. In a *ſcire facias* by that ſtatute, there ſhall not be that ſolemnity of proceeding as in other proceſs; nor ſhall the tenant or defendant, though a ſtranger to the recovery, plead any thing that proves it erroneous or voidable; but only ſuch matter as proves it void, or is a bar of execution. He likewiſe cited 43 *Edw.* 3. *pl.* 13. *—And they have here pleaded *a dilatory plea*, (*a*) and we have tendered an iſſue to them; it ſhall therefore be peremptory to them. (*b*) He urged *Long Quinto* 5 *Edw.* 4. *pl.* 139. that a plea *after the laſt continuance* was peremptory. *Stoner v. Gibſon*, *Hob.* 81.

SAUNDERS *e contra.* Where the county is not troubled with the trial of an iſſue upon a plea in abatement, but there is a demurrer, there the defendant may always *plead over:* he agreed it true, where there is a plea in bar and afterwards a plea in abatement, it is peremptory, becauſe it is a waiver of the plea in bar, otherwiſe not.

* [43]

JONES *Juſtice* remembered them of the caſe of *Moor v. Hawkins* in *Yelv.* 181. where entry into parcel after ejectment brought, was

(*a*) By 4 Ann. c. 16. ſ. 11. "no dilatory plea ſhall be received in any court of record, unleſs the party offering ſuch plea do, by affidavit, prove the truth thereof, or ſhew ſome probable matter to the court to induce them to believe that the fact of ſuch dilatory plea is true."

(*b*) 6 Mod. 236.

COLOP. v. BRANDON.

pleaded at the aſſizes and held allowable, and to be peremptory, but this caſe differed from that.

SCROGGS *Chief Juſtice* ſaid, It would be inconvenient to make this plea peremptory, for perhaps the defendant thought J. S. to be *a terre-tenant*, but afterwards found him to be only leſſee for years.

And SAUNDERS averred, and in truth it is ſo, that the plea in abatement in *Long Quinto Edw.* 4. *pl.* 139. was at the *niſi prius* before the juſtices there after a former plea in bar; and ſo it differs from the caſe at bar.

And ALL THE COURT inclined to give judgment that the defendant ſhould *anſwer over:* but upon WESTON's importunity they conceded to adviſe, and look into the books he had cited.

Afterwards a *reſpondeas ouſter* was awarded.

See the whole pleading in this cauſe in *Theſaur. Brevium*, 282, 283.

Caſe 30. Staples *againſt* Mellor.

A *preſcription* by a burgeſs, that the mayor and burgeſſes of the corporation have, time out of mind, had a right of common for themſelves, and each of them, in ſuch a place, is good.
2 Saund. 45.
1 Lev. 196.
2 Lev. 2.
1 Mod. 74.
1 Vent. 163. 383.
S. C. 2 Jones, 115.
S. C. 2 Lev. 246.
Poſt, 78.
See Nelſon's Lutw. 431, 473.

REPLEVIN. The defendant avows for *damage feaſant:* the plaintiff replies, that they and their predeceſſors, and all the burgeſſes, &c. have time out of mind had *common* in ſuch, &c.

WESTON *Serjeant* moved in arreſt of judgment (there having been a verdict for the plaintiff) that their preſcription is only for cattle belonging to the corporation, &c. and took a diverſity between *intereſts* and *eaſements*; (*a*) for *intereſts* are ſo applied to * the body politic, that none can make uſe of them but in their politic capacity; and if the plaintiffs would have pleaded well, they ſhould have *preſcribed* as particular tenants to the mayor and burgeſſes.

MR. HOLT *è contra.* This very caſe *in totidem verbis* has been adjudged in LORD HALE's time in the caſe of *Walker v. Miller*, (*b*) where the defendant juſtified in the bailiff and burgeſſes *quouſque*, *&c.* and then in the mayor, aldermen, and burgeſſes, for all cattle *levant et couchant* within the borough, and that the defendant was a burgher; and, on demurrer thereto, becauſe ſaid not *ſeiſed* of any land to which it might be appurtenant, it was held that they might have *common appurtenant* to the borough by *preſcription*; and the common courſe is to lay it in this manner; there is no other way to alledge it but this; the entries are all ſo; and when it is ſaid "for their cattle" it is meant diſtributively, and not as MR. SERJEANT WESTON would have it, only for the cattle which belong to the cor-

* [44]

(*a*) 6 Co. 60. Cro. Eliz. 180. Cro. Jac. 152. Cro. Car. 419.

(*b*) This caſe is reported, 1 Sid. 462.

poration in general: if a grant be to a corporation of all its freemen to be exempt from toll or the like, and any of them be diſtrained, he may bring an action in his own name.

WESTON afterwards moved it again, and argued, that this being a *common appurtenant*, for all beaſts *infra burgum* was naught, becauſe a *common appurtenant* cannot be preſcribed for beaſts *levant in alieno ſolo*, and cited *Roll, tit.* "*Common*," 403. and he inſiſted upon the caſe 15 *Edw.* 4. 29 & 30. where ſuch a preſcription is held naught, (*c*) but agreed by COKE, that it may be good for the mayor, &c. to preſcribe for themſelves and all the inhabitants, becauſe they ſhall be ſuppoſed tenants at will; but to lay it in the burgeſſes for all themſelves is ſurely naught. (*d*)

MR. HOLT *e contra*. The conſtant rule is, that which may be ſuppoſed to have a reaſonable commencement, for ſuch a thing a preſcription may be. It is no new thing for a corporation to have an eſtate, and the members to have an intereſt. In the caſe of *Miller v. Staples*, (*e*) of the corporation of *Derby*, it is held, a corporation may preſcribe to have a common without number *in groſs*, and in the caſe of *Hoſkins v. Robinſon*, (*f*) by way of *cuſtom* it is held good. We have * not laid it a *common appendant*, for then we muſt have laid it in *a vill*, and that they were ſeiſed of all the vill, but it is laid as a common without number, and a corporation may have that: upon a like reaſon a common may be ſtinted for particular beaſts, and why may not a corporation have it? Why may not a man have an intereſt of common for his own proper beaſts in the right of the corporation of which he is a member? He may be ſued by his proper name and by the name of the corporation both, if he commit a treſpaſs by command of the corporation. (*g*) In the caſe of *Miller v. Spakeman*, (*h*) it is held, that if it had been ſaid for beaſts *levant et couchant* within the vill, it would have been good.

* [45]

WESTON *Serjeant* granted that a *perſonal preſcription* may be ſo as MR. HOLT would have it, but not a *real preſcription*; for there the inhabitants have too weak an eſtate.

DOLBEN *Juſtice* ſaid, that there may be a preſcription for common by way of *cuſtom*, as there is in *York* and *Glouceſter*, where they have by uſage a common in lands adjoining for half the year, even from *Michaelmas* to *Lady-day*.

PEMBERTON *Juſtice*. The only difference between you two, ſeems to be whether this ought to be laid by way of *cuſtom* or by way of *preſcription*.

SCROGGS *Juſtice*. The pure nature of a *common in groſs* is for all his cattle thoughout the whole kingdom, ſo they be cattle of the

(*c*) A right to take profit *in alieno ſolo* muſt be claimed by *preſcription*; it cannot be claimed by *cuſtom*, Grimſtead v. Marlowe, 4 Term Rep. 717.

(*d*) 6 Co. 60. Cro. Jac. 152. 446. 9 Leon. 94. Godb. 97.

(*e*) 1 Mod. 6. 1 Saunders, 339.

(*f*) 1 Mod. 74.

(*g*) Year Book, 9 Hen. 6. pl. 36.

(*h*) Mich. Term, 21 Car. 2. 1 Saund. 343. S. C. 2 Keb. 527. 550. 570.

owner

STAPLES v. MELLOR.

owner of the common; this at the bar, in a ſtrict ſenſe, can be neither *in groſs*, nor *appendant*, nor *appurtenant*, but is as *ſhack common*, and common in ſome places in *Lincolnſhire*, and many others, that can never come under either of theſe three; and I ſee no reaſon why it is not a *common in groſs* when it is for all my cattle *levant et couchant*, on ſuch and ſuch acres of my land as well as for all my cattle throughout the kingdom: the jury find a right of common, and becauſe ſtrictly it cannot be preſcribed for, as one of the three ſorts as *Mr. Littleton* mentions, ſhall a man therefore looſe his common? Though we are to follow the rules of law, yet reaſon is to be obſerved too.

* [46]

* PEMBERTON *Juſtice*. There may be other commons that are not preciſely of theſe three, and it is fit there ſhould be a remedy where it is clear that a man has a right; to which the reſt agreed.

And judgment was given for the plaintiff, *viz.* that ſuch a common is well enough alledged by *preſcription* as well as by *uſage* and *cuſtom*. (*i*)

(*i*) But ſee the caſes of Bean v. Bloom, 2 Bl. Rep. 926. 3 Wilſ. 456. and Grimſtead v. Marlow, 4 Term Rep. 719.

Caſe 31. Butler *againſt* Waterhouſe.

Fraudulent ſettlement.
3 Co. 81.
2 Lev. 146.
3 Keb. 840.
2 Vern. 285. 510.
Lane, 22.
Bridg. 23.
2 Wilſ. 356.
Cowp. 432. 705.
2 Term Rep. 587.
4 Term Rep. 39.

TROVER and converſion. A ſpecial verdict finds a deed of ſettlement for eighty years, with ſeveral other limitations, with a proviſo of revocation as to all the uſes ſave the eighty years, and afterwards a ſale to the defendant without revocation or conſent of truſtees; concluding, that if by the 27 *Eliz. c.* 4. it be void againſt the defendant as fraudulent, then they find for the plaintiff.

The queſtion was, if the Court could judge of fraud?

It was argued that they could not judge it fraudulent, unleſs the jury had found it ſo.

On the other ſide it was urged, that the Court might judge of the proviſo in the ſtatute 27 *Eliz. c.* 4. and if this ſettlement were void within that act by reaſon of the power of revocation. There was cited the caſe of *Standon v. Bullock*, 3 *Co.* 82. *Brownl.* 190. *Bridgm.* 23. *Lane* 22.

Adjornatur.

Morris

Morris *againſt* Wilford. Caſe 32.

Trinity Term, 28 *Car.* 2. *Roll* 479.

COVENANT to ſave the plaintiff harmleſs as to the perſonal eſtate of *Sir Samuel Sterling*, the teſtator, in truſt for his wife and children: the breach was aſſigned in a ſuit againſt the plaintiff and putting him to charge. The defendant pleads *a releaſe* of all the plaintiff's right and demand of, in, and to, the perſonal eſtate of, &c. according to the cuſtom of *London*, or otherwiſe.

A releaſe ſhall be conſtrued according to the *particular purpoſe* for which it was made.

S. C. 2 Lev. 214.
S. C. 3 Keb. 814-840.
S. C. 2. Jones, 104.
S. C. Freem. 474.
Yelv. 156.
Cro. Jac. 222.
3 Lev. 274.
1 Show. 150.
3 Mod. 277.
Carth. 119.

The plaintiff demurs becauſe the releaſe is particular, and the breach was in the teſtator's life-time, and the damage was uncertain and therefore could not be releaſed; the executors could make no compoſition for it till it was determined, * for that would be a *devaſtavit* in them; as was the caſe of *Nordon v. Levett*, reported in 3 *Keb.* 691. a releaſe of all demands bars not a covenant. 25 *Aſſize* 7. And that caſe has been taken for law all along. *Co. Lit.* 185, 265. In *Hoe's caſe*, 5 *Co.* 71. A releaſe of demands in a perſonal eſtate, no bar to action for battery before; and notwithſtanding a releaſe of all demands in or to the goods and perſonal eſtate to the executor, yet may they be taken in execution for damages recovered after on breach of covenant before; and this is no more than a releaſe of right to land by debtee to debtor, or his heir.

* [47]

On the other ſide it was urged he can never have execution againſt his own releaſe, here is nothing liable but only the perſonal eſtate; and therefore that is diſcharged by the releaſe.

Adjornatur. (*a*)

(*a*) JONES, WYLD, and TWISDEN *Juſtices*, were of opinion upon the firſt argument in Mich. Term, 29 Car. 2. that the releaſe is no bar notwithſtanding the *general words*, for being made for *particular purpoſes* the general words are to be guided by the particular purpoſes. RAINSFORD *Chief Juſtice contra.* The caſe was argued a third time in Hilary Term 30 & 31 Car. 2. when by THE WHOLE COURT judgment was given for the plaintiff, S. C. 2 Lev. 216. S. C. 2 Jones, 104.

The King *againſt* Carpenter. Caſe 33.

INFORMATION in nature of a *quo warranto* againſt the defendant, who, as a farmer of the city of *London*, claimed ſeveral duties belonging to the *water bailage*, as two pence a chaldron for coals imported. And held PER CURIAM, that a verdict upon the *quo warranto* upon the mere right concludes THE KING; but on an *information* it does not.

The king is concluded by a verdict, upon the mere right in a *quo warranto*, but not in an *information*.

HELD, that the mayor has been time out of mind conſervator of the *Thames*.

The Mayor of *London* is conſervator of THE THAMES by preſcription. Laws of Lond. 180.

HELD

On an indictment for not repairing a bridge which the defendant is bound to repair *ratione tenuræ*, the inhabitants of the county may be witneſſes.

6 Mod. 307. 1 Burr. 359. Bull. N. P. 288.

HELD AND RESOLVED, that if an indictment be againſt a man for not repairing a publick bridge which he is bound to repair *ratione tenuræ*, that, in ſuch caſe, perſons of the county are allowed to be witneſſes, becauſe none elſe can teſtify, &c. (*a*) In caſe of action on the ſtatute of HUE AND CRY againſt a hundred, none of the hundredors can be witneſſes, becauſe any one of them is liable to pay the debt after judgment againſt the hundred. A pariſhioner cannot be a witneſs on a queſtion, whether land be within the pariſh or not: (*b*) but a legatee of a ſmall ſum of money has ſometimes been allowed a witneſs to prove a will. (*c*) In caſe of queſtion about a toll for a ferry, watermen have been allowed witneſſes.

In a queſtion whether the corporation are entitled to a port duty the *freemen* may be witneſſes.

S. C. 2 Lev. 231. Poſt, 146. Dougl. 359. 374. Eſpinaſſe Digeſt, 2 edit. 706.

And freemen here in this caſe of *London*, where it is hard to have other witneſſes, and it is very improbable * they ſhould be biaſſed in their ſwearing, it being ſo very little or nothing to their advantage. And ALL THE JUDGES (except JONES *Juſtice*) held that freemen might be witneſſes. (*d*)

* [48]

The teſtimony of a witneſs on one trial may, after his death, be given in evidence on another trial.

IT WAS HELD LIKEWISE by the Court, if a witneſs ſwear in a cauſe and die, that, in another trial, one that heard him may, upon oath, repeat his teſtimony, and it ſhall be good evidence. (*e*)

A verdict between *private parties* cannot be given in evidence againſt THE KING.

2 Keb. 384. 1 Ray. 730. Hard. 462. Yelv. 22. 3 Mod. 141. Hob. 53. 2 Stra. 1151. Bull. N. P. 239.

But a verdict between private perſons may not be read as any evidence againſt THE KING in an information upon a *quo warranto*.

(*a*) Inhabitants are in this caſe rendered competent witneſſes by 1 Anne, ſt. 1. c. 18. See 6 Mod. 307.

(*b*) See Hockley v. Lamb, 1 Ld. Ray. 731. Eſpinaſſe Digeſt, 2 edit. 713.

(*c*) By 25 Geo. 2. c. 6. ſ. 3. any beneficial deviſe, legacy, eſtate, intereſt, gift, or appointment made to any perſon being a witneſs to any will or codicil ſhall be void, and ſuch perſon be admitted a witneſs. Bull. N. P. 265.

(*d*) See Cook v. Baker, 3 Keb. 12. Lord Dorſet v. Carter, 3 Keb. 300. Rex v. Philips and Archer, Bull. N. P. 289. Rex v. Bray, Bull. N. P. 290. Corporation of Sutton Coſield v. Wilſon, 1 Vernon, 254. 12 Viner Abr. 17. Dodſwell v. Nott, 2 Vern. 318. Sadler's Company v. Jones, 6 Mod. 165. Bridgport caſe, 12 Viner Abr. 20. The City of London v. the Unfree Merchants, Poſt, 146.

(*e*) But the record of the cauſe muſt be produced, or ſuch hearſay evidence is not admiſſible, *per* PEMBERTON *Chief Juſtice*, Poſt, 163. and ſee the caſe of Sampſon v. Tothil, 1 Sid. 325. Sir John Fenwick's caſe, 5 State Trials, 73. that the evidence given by a witneſs at one trial cannot, in the ordinary courſe of juſtice, be made uſe of againſt a defendant, on the death of ſuch witneſs, at another trial. 2 Hawk. P. C. 46. ſ. 12. But in caſes of *cuſtoms* or *tolls*, and in general in all caſes where hearſay and reputation are evidence, the depoſition of a witneſs in chancery may, after his death, be read in evidence on a trial at law, Bull. N. P. 239, 240.

MAYNARD *Serjeant* urged, that in the thirty-fourth year of *Edward the firſt* the city complained of bringing in coals as a nuiſance; and therefore their duty could not be before that time. In the reign of *Richard the ſecond* they had *a grant* from the king for a halfpenny a chaldron of coals, and therefore it cannot be a preſcription; it is moſt plain ſea coals have been not burned time out of mind here in *London*, and therefore no preſcription: and among their duties they claim for hops which have not been time out of mind.

On evidence of conſtant payment of the *water bailages* on coals imported into *London*, a *grant*, although within the time of legal memory, may be preſumed.

12 Co. 4. 34. Vaugh. 159. Stra. 1129. 2 Vezey, 621.

However upon evidence of conſtant payment, and their ancient tables of duties for goods imported into *London*, a verdict was given for the defendant. (*f*)

(*f*) See the caſe of the Mayor of Kingſton-upon-Hull v. Horner, Cowp. 102 to 111, in point, and Eldridge v. Knott and others, Cowp. 214. and Fiſher v. Proſſer, Cowp. 217.

Anonymous. Caſe 34.

HELD PER CURIAM, upon motion, that to prove a will in common form, and to have a probate under ſeal, a writ of *mandamus* lies. *Fitzh.* 202. *Style* 22. *Duncomb's caſe* here in this court in LORD HALE's time. And *a mandamus* was accordingly granted in this caſe.

A *mandamus* to grant *probate* of a will.

2 Roll Rep. 107. Ray. 235. 1 Vent. 335. 1 Sid. 281. 372. 4 Burr. 2295.

1 Lev. 187. Carth. 457. Stiles, 7. 1 Bl. Rep. 640. 668.

Anonymous.

IN A TRIAL *at bar* upon an iſſue directed out of chancery, concerning the republication of a will, IT WAS RESOLVED by all the Court, that theſe words, "my will in the hands of J. S. ſhall ſtand," amount to a good republication.

"My will in "the hands of "J. S. ſhall "ſtand," a good republication.

1 Roll Abr. 618. Moor, 429. Cro. Eliz. 493. 2 Vern. 209. Wentworth, 36. 1 Eq. Caſ. Abr. 407. Cowp. 49. 130. Dougl. 31.——But ſee Powell on Deviſes, 655, where this is ſuppoſed to be the caſe of Collier v. Collier, reported 2 Ch. Caſes 72. 1 Freem. 264. and cited in Alford v. Carle, 2 Vern. 209.

* Lee *againſt* Stephens and others. Caſe 35.

Trinity Term, 29 *Car.* 2. *Roll* 715. * [49]

EJECTMENT. Special verdict. A. being ſeiſed of the lands in queſtion deviſes the ſame to *James* conditionally, "that "he ſhall allow to my ſon *Nicholas*, meat, drink, apparel, waſhing, "and lodging during his natural life."

A deviſe to A. conditionally that he ſhall allow to the ſon of the teſtator "meat, drink,

"apparel, waſhing and lodging during his natural life," conveys an eſtate in fee to A.——S. C. Pollexf. 539. S. C. 2 Jones 107. Ante, 36. 2 Lev. 162. 3 Keb. 589. 3 Lev. 70. Cro. Eliz. 525. Cro. Car. 51. Cro. Jac. 415. Mod. Ca. 110. 2 Bl. Rep. 938. 1215. 1 Bl. Rep. 645. 3 Com. Dig. "Deviſe" (N. 4.) 3 Term Rep. 356.

LEE v. STEPHENS.

The ſole queſtion was, if *James* took a fee ſimple by this deviſe or only an eſtate for his own life?

Mr. POLLEXFEN urged *Collier's caſe*, (*a*) that where the money is to be paid *annually* and not as a ſum *in groſs*, but ſuch which may ariſe out of *the profits*, the deviſee has then only an eſtate for life; and that here the teſtator intended it ſhould be out of *the profits* that *Nicholas* ſhould be maintained.

But PEMBERTON *Juſtice* took a diverſity in thoſe caſes cited by Mr. POLLEXFEN, where the money to be paid was ſomewhat granted and ſecured before the death of the teſtator, and where the charge is laid by the teſtator on the deviſee.

SAUNDERS argued that it is a fee ſimple; for *Nicholas* has no manner of proviſion elſe, but only an allowance of meat and drink. It is plain the teſtator deſigned the maintenance to be for *Nicholas's* own life, and not that when *James* ſhould die, *Nicholas* ſhould ſtarve: and therefore it is clear that *James* muſt have a larger eſtate than for his own life; for otherwiſe, inſtead of having a benefit by this will, he will be damaged and prejudiced by it if he ſhould perform the teſtator's will, *viz.* provide for *Nicholas* during his life. If this were not a fee, *Nicholas* muſt faſt, and have no lodging till the quarter's rent be paid, or the profits come in, and ſo there would be a charge without any profit; for ſuppoſe *James* ſhould maintain *Nicholas* for half a year and then die, he would have loſt by the will. *Nicholas* muſt be provided for daily; now profits iſſue not daily out of the land.

For which reaſons it was adjudged by ALL THE COURT that *James* had a fee ſimple.

(*a*) 6 Co. 16.

Caſe 36.

* [50]

* Baſtard *againſt* Stockwell.

A prohibition lies, if the ſpiritual Court refuſe a plea to the juriſdiction, or proceed in a libel for a legacy to be paid out of lands.

S. C. 2 Jones, 230. S. C. 2 Lev. 209. S. C. 3 Keb. 440. 458. 490. 613. 2 Roll Abr. 284. F. N. B. 45. 2 Roll Rep. 433. Cro. Jac. 279. Palm. 120. Poph. 58. Hob. 265. 1 Lev. 164. 2 Lev. 162. 187. 217. 222. Stra. 847. Cowp. 422. 424.

MR. POLLEXFEN moved for a prohibition. The caſe was thus: J. S. libels in the conſiſtory court of the biſhop of *Exeter*, againſt C. and D. two ſiſters to B. and executors of his laſt will, for *a legacy* left, &c. They pleaded no aſſets, and made a ſpecial allegation that A. their father was poſſeſſed of ſeveral long leaſes in ſeveral tenements, and deviſed them "to B. his ſon; but if he "ſhould die unmaried, or if he ſhould marry and die without iſſue, "then C. and D. his two daughters to have thoſe leaſes, &c." and that B. dying without iſſue, they claim as deviſees of A. their father, and not as executors of B. their brother; and the Court there overruled this plea of theirs.

And

And a prohibition was granted because it is matter of *title* with which they ought not to meddle. BAYARD v. STOCKWELL.

And held PER CURIAM, that none can sue in the ecclesiastical court for a legacy arising out of land, because not within their conusance.

Pollard *against* Evans and others. Case 37.

CASE in nature of a conspiracy. The declaration stated, that the defendants by combination and conspiracy, &c. did procure the plaintiff to be causelessly indicted of, &c. The defendants were all found *not guilty*, except *Evans*, against whom there was a verdict.

A *writ* of conspiracy must be against *two*; but an *action* on the case in the nature of conspiracy for a *malicious prosecution* will lie against *one* person only, although the jury do not find the bill; but the declaration must shew that the prosecution is at an end. Raym. 118. 176. 1 Vent. 12. 18, 234. 1 Saund. 229.

It was moved in arrest of judgment that, upon this record, it appears the declaration is false; for a conspiracy cannot be in or by *one*, but between *two* at the least; and *Fitzherbert* was cited for it.

But it was answered and resolved by THE COURT, that in a *writ of conspiracy* it is true, (*a*) but in an *action of the case* it is otherwise; and though this be like the other, yet it is not the same. And this diversity has been often allowed in this court. As likewise that in a writ of conspiracy, it must be alledged that the party was *legitimo modo acquietatus inde*, and shew that it was a fair acquittal. (*b*) But this action will lie for such a malicious prosecution where * the jury find an *ignoramus*, &c.

Judgment for the plaintiff. (*c*)

* [51]

(*a*) Fitz. N. B. 114. 2 Bulst. 271. 3 Saund. 230. Cro. Eliz. 701. Jones, 84. Cro. Jac. 93.

(*b*) 9 Co. 56. 12 Co. 23. 1 Sid. 15. Cro. Jac. 131. 230. Cro. Car. 286. Stra. 114. Dougl. 215. and Morgan v. Hughes, 2 Term Rep. 231.

(*c*) See Subley v. Mott, 1 Wms. 210. in point. See also Chambers v. Robinson, Stra. 691. Jones v. Gwynne, 10 Mod. 148. 214. and Weeks v. Fentum, 4 Term Rep. 247. that an action for a malicious prosecution will lie, though the defendant be acquitted on a defect in the indictment.

Gardiner *against* Dudgate. Case 38.

DEBT on a sheriff's bond. Upon *oyer* of the condition, it appeared to be for an appearance in the King's Bench court, in trespass of one hundred pounds, whereas the writ was *de placito transgressionis ac etiam billæ de debito* one hundred pounds.

Debt on a sheriff's bond conditioned to answer the plaintiff in a plea of *trespass* generally is good, although the writ is to answer in a plea of trespass with an *ac etiam* in *debt*.

MR. POLLEXFEN argued, that this bond was not warranted by the statute of 23 *Hen.* 6. *c.* 10. upon account of this variance.

HOLT. The appearance, and the day, and the court, and the party at whose suit, &c. are all well expressed as they should be; and

2 Lev. 123. 177. 180.

GARDINER v. DUDGATE.

the *ac etiam* is not of the ſubſtance of the writ, but only declares the intention how he will declare, and is grounded on the ſtatute 13 *Car.* 2. *ſt.* 2. c. 2.

DOLBEN *Juſtice* cited the caſe of *Villers v. Haſtings*, (*a*) where exception was taken becauſe the obligation was for one hundred pounds, for that a bond of forty pounds was ſufficient to excuſe the ſheriff from eſcape; but held well enough, though a greater ſum; and the writ was *de placito debiti* a hundred pounds and the condition of the ſheriff's bond was only *debiti*, and yet held good: the deſign of the ſtatute was to prevent extortion and oppreſſion; and here, in this court, *Hill.* 27 & 28 *Car.* 2. a bond was adjudged good (*b*) where the condition was to appear *coram juſticiariis de banco*, where it ſhould have been *coram domino rege.*

RESOLVED that the bail bond was good in the principal caſe, and judgment for the plaintiff. (*c*)

A bail bond is for the appearance of the defendant according to *the writ.* Cro. Jac. 286. 1 Saund. 21. 2 Vent. 237. 2 Lev. 180. Stra. 1155. 1 Term Rep. 240.

AGREED by the Court, that the bail bond to the ſheriff is to make him appear according to *the writ*, and not according to *the condition* of the bond; and the bail are, by virtue of the bond, engaged that he ſhall anſwer according to this writ, if it require ſpecial bail, (*d*) either to render him or to give ſpecial bail; which if he do not, they will not file his appearance but ſue the bail bond, (*e*) and the bail can never plead to it "*quod comperuit ad diem*;" for it is no appearance till filed. (*f*) This is the conſtant practice of the court; every bail ought at his peril to ſee and take notice * of the writ before he is bound, that thereby he may know what it is he engages for; if he do otherwiſe, he is bound to do he knows not what, and he muſt ſuffer for it. (*g*)

* [52]

(*a*) Cro. Jac. 286.

(*b*) This ſeems to be the caſe of Kirbridge v. Dyke, 2 Jones, 46. in the King's Bench, where it is ſaid to have been adjudged good, S. C. 3 Keb. 686; but S. C. 2 Lev. 180, a writ of error was brought and adjourned, and ſee Moor v. Finch, Lev. 177.

(*c*) See the caſe of Kirkbridge v. Wilſon, where the bond was to anſwer the plaintiff generally without ſaying in what action; and held good, 2 Lev. 123. So in Lawſon v. Haddock, where the writ in *treſpaſs* was to appear before "the lord the "king," and the condition was to appear "before the juſtices of the King's Bench." 2 Vent. 237. See alſo Cudwell v. Dunkin, 2 Jones, 137. Groſvenor v. Soame, 6 Mod. 122. Ruſhworth v. Wade, poſt, 94. Rench v. Britton, 10 Mod. 327. Tidd's Practice, 107.

(*d*) Poſt, 183. 335.

(*e*) See 4 & 5 Anne, c. 16. 12 Geo. 1. c. 29. and 5 Geo. 2. c. 27.

(*f*) See Carmichael v. Chandler, 5 Burr. 2683.

(*g*) By 12 Geo. 1. 29. the ſheriff ſhall not take a bail bond for more than the ſum ſworn to by the plaintiff, and indorſed on the writ; but the general practice is to take it in double the ſum ſworn to, Norden v. Horſley, 2 Wilſ. 69. The condition of this bond, which is for the appearance of the defendant on the return day of the writ, can only be performed by putting in bail to the action, 5 Burr. 2683. The bail are bound by their recognizance to ſatisfy the plaintiff his *debt* and *coſts*, or to render the principal into his cuſtody, if judgment ſhould be againſt the defendant. Sellon's Pract. 147. If the bail bond be forfeited, and the bail ſued purſuant to 4 & 5 Anne, c. 16. they are liable to pay what is really due to the plaintiff, though beyond the ſum ſworn to, and coſts to the full extent of the penalty of the bond. Rule, Michaelmas Term, 8 Anne. 2 Stra. 1262. Tidd's Pract. 157. Dougl. 330. this is alſo the practice in the Common Pleas, Mitchel v. Gibbons, 1 H. Bl. Rep. 76. See Cowp. 71. The extent however of the liability of BAIL *to the action* was, as the reporter obſerves, uncertain, 6 Mod. 266. 1 Salk. 102. 3 Keb. and has been matter of much controverſy, Sellon's Pract. 157. but it ſeems now to be ſettled, that although the plaintiff recover more, the bail are only liable to the extent of the ſum ſworn to in the writ, Stra. 922. Rule, Eaſter Term, 5 Geo. 2. and coſts, Tidd, 131 to 330.

Hill

Hill *againſt* Boomer. Caſe 39.

PROHIBITION; declaration therein; and plea to it; and demurrer thereon.

The caſe was thus. A parſon is cited to appear before his ordinary for that he being *a layman* took a benefice. The declaration ſtated that he was *a prieſt* ordained, &c. The defendant pleaded that he was not a prieſt at the time of the admiſſion, inſtitution, &c. *et hoc paratus eſt verificare.* The plaintiff replies that he was a prieſt ordained according to, &c. at the time of his preſentation, admiſſion, inſtitution, and induction, at *Boſton*, in the county of *Cornwall, et hoc paratus eſt, verificare.*

The queſtion was, whether "prieſt or no prieſt" ſhould be tried *per pais.*

By the ſtatute 14 *Car.* 2. *c.* 4. "no perſon who is not ordained "a prieſt or deacon, according to the form of epiſcopal ordination, "ſhall have, hold, or enjoy any parſonage, vicarage, or benefice with "cure, or other eccleſiaſtical promotion, but ſhall be utterly diſ-"abled, and *ipſo facto* deprived of the ſame, and all his eccleſiaſtical "promotions ſhall be void as if he were naturally dead."

It was URGED, that the plea is good, becauſe it ſhall be tried *per pais*, for being a ſpecial iſſue it ought to be ſo tried (*a*) and that the defendant could not pray a writ to the biſhop, becauſe the plaintiff in his declaration lays not by what biſhop, but only that he was a prieſt: in *Raſtal* (*b*) it is ſaid, that in pleading a bargain and ſale he ought to ſay in what court, otherwiſe it would be infinite labour to ſearch all courts. So in our caſe, to ſend writs to all the biſhops. (*c*) This purely belongs to the biſhop, and there is no way to get him out but by deprivation firſt.

MR. POLLEXFEN *è contra.* This is within the juriſdiction: the act of uniformity, 13 and 14 *Car.* 2. *c.* 4. ſays the church is "void "and not full, except a prieſt ordained, &c." and therefore it may be tried at common law, as by ejectment. If he could be turned out only by deprivation, then the eccleſiaſtical court might have conuſance; now they are not judges of the fact at all; they would have "prieſt or no prieſt" tried by the country, and admiſſion and inſtitution tried by the biſhop's certificate; if they had made the time to be the ſole point in iſſue, as by granting that he was * a prieſt, but that he was not ſo when preſented, admitted, &c. but here are ſeveral things heaped together in their iſſue; moſt of which do belong to the eccleſiaſtical courts. * [53]

Quære MR. POLLEXFEN's argument, for I could not well hear it.

The queſtion whether a perſon was *a prieſt* at the time of his admiſſion to a benefice, ſhall be tried by *the biſhop* and not by *the country*; for though 13 & 14 Car. 2. c. 4 ſ. 13. ſays "that every "perſon not "ordained "ſhall be diſ-"abled, and "*ipſo facto* de-"prived, and "his promo-"tion void as "if he was na-"turally dead," yet being declaratory of the common law, he is not diſabled until he is deprived, and the act of deprivation belongs to the biſhop.

S. C. 2 Lev. 250.
S. C. 2 Jones, 131.
S. C. 3 Keb. 567. 827.
S. C. 3 Mod. 1 Vent. 309. 319.
2 Lev. 199.

(*a*) Year Book, 9 Hen. 7. pl. 2. Edw. 4. pl. 24. Yelv. 21. Litt. ſect. 200.
(*b*) Raſtal Ent. 220. Year Book, 9 (*c*) Dyer 233. Hob. 148.

Hill v. Bowers.

Scroggs *Chief Juſtice.* Time here is merely a circumſtance in the iſſue tendered.

Jones *Juſtice.* The trial here in this caſe ought to be by the biſhop; where a time is only a circumſtance of a ſpiritual act, there the whole matter ought to be tried by the biſhop; but if the ſpiritual act is admitted, as poſſeſſion, &c. and the time only is queſtioned this ſhall be tried *per pais.*

Pemberton *Juſtice.* The ſole queſtion ſeems to me in this caſe to be, whether or no the living or benefice be abſolutely void by the ſtatute? if it be void by the ſtatute, and ſo abſolutely void by the ſtatute that there needs no deprivation to make it ſo, then no conſultation ought to go; for they have nothing to do therewith, being an abſolute avoidance by ſtatute: at the common law the ſuit ought to be there for deprivation *quia mere laicus*; and we could not prohibit it becauſe it muſt be avoided by deprivation.

Dolben *Juſtice.* The words are ſtrong to make it void; "No "perſon who is not already in orders by epiſcopal ordination, or "ſhall not be before, &c. ſhall hold and enjoy, &c. but ſhall be "diſabled and *ipſo facto* deprived of the ſame, and the ſame to be "void as if he were dead, &c."

Mr. Holt, in the Hilary Term following, argued it again, that a *conſultation* ought to go; for the matter is nothing but this: a rector is libelled in the court chriſtian to be deprived, becauſe not *a prieſt* at the time of his admiſſion, &c. The ſpiritual court had conuſance of this matter before any act of parliament; for to be a prieſt was a neceſſary qualification by the common law as to that matter. *Dyer* 292. and the act of uniformity is no more but an affirmance of the common law; and does not make it *ipſo facto* void, but only voidable by deprivation, which only can be in the ſpiritual court: now here are no words that take away their juriſdiction; * it ſays a man ſhall be incapable, but it does not ſay his admiſſion, inſtitution, and induction ſhall be void; now this incapacity makes it only void at common law; ſuch as is the diſability of a perſon attainted or of an alien, he may purchaſe but cannot retain; this does not make the acceptance void, ſo that deprivation ſeems to be ſtill neceſſary: beſides, the ordinary, *quatenus* ordinary, has juriſdiction of the cauſe; then admitting the act makes it void *ipſo facto* as in caſe of ſimony, yet this does not take away the eccleſiaſtical juriſdiction, for they may examine ſimony, and though, as to ſimony, there is a clauſe that ſaves their juriſdiction as to puniſhing the party, yet doubtleſs they might do it had there been no ſuch clauſe. (*d*) As to the pleading, we have pleaded that he was "no prieſt" at the time, and concluded with the country; though "prieſt "or no prieſt" be triable only by certificate, yet the time is triable *per pais.* (*e*) But if that be naught, how comes their prohibition to be good? for that he was a prieſt is their ſuggeſtion.

* [54]

Mr. Saunders *è contra.* If a ſpecial iſſue be joined, the biſhop

(*d*) See the caſe of Smith v. Shelbourn, Cro. Eliz. 685. and Baker v. Rogers, Cro. Eliz. 788. 4 Bl. Com. 62.

(*e*) Year Book, 1 Hen. 7. pl. 2.

ſhall

ſhall try "prieſt or no prieſt;" but if the patron had preſented, as doubtleſs he might, and the biſhop had refuſed, a *quare impedit* might have been brought; or if after admiſſion, inſtitution, and induction an *ejectment* had been brought, it ſhould be tried *per pais*. The biſhop cannot originally convene this cauſe before him, though he ſhall try it when the king's courts write to him, as in caſe of general baſtardy, loyalty of marriage, &c.

SCROGGS *Chief Juſtice.* This thing is triable only *per pais* when it is a collateral matter: at common law a *mere laicus* was incapable. By a ſtatute, 13 *Eliz. c.* 12. *ſ.* 4. *a deacon* was made capable; by this ſtatute, 13 and 14 *Car.* 2. *c.* 4. none but *a prieſt* is ſo, and ſo it is reſtorative of the common law; ſo that regularly and properly this is of ſpiritual conuſance. I take the ſtatute to be declarative of the common law, and the benefice not to be *ipſo facto* void, but that there muſt be a deprivation; and it is not like the caſe of a woman preſented, for that is a perfect nullity. Certainly there cannot be any lapſe, for when a *mere laicus* is in, the church is full, and the patron muſt have notice, * and notice is concluſive; and how can the biſhop give notice if he may not examine: and he cannot examine unleſs he can cite the party.

* [55]

JONES *Juſtice.* I think it void; and the ſtatute not declarative of the common law; for the words are (as I take them) "and ſhall be void as if he were actually dead."

DOLBEN *Chief Juſtice.* I think the act only reſtorative of the common law: and ſuppoſe there be another remedy, ſhall this take it out of the ordinary's hands: they do uſually deprive for ſimony; nay, in *Green's caſe*, 6 *Co.* 29. they deprive for not reading the thirty-nine articles, and yet that was no offence before the ſtatute.

A conſultation was afterwards granted by THE WHOLE COURT, and JONES *Juſtice* declared himſelf clearly of opinion with the others, though he doubted upon the ſecond argument.

Roch *againſt* Cooling. Caſe 40.

A writ of error pending cannot be *pleaded* in bar to an action on the judgment, but the court will *ſtay the proceedings* unleſs good cauſe be ſhewn why *execution* was ſued out. 1 Sid. 236. Lutw. 602. 651. 1 Show. 146.

UPON motion here to ſtay proceeding in an action of debt brought on a judgment here, whereupon a writ of error was ſued and pending in the Exchequer Chamber.

And granted; all things being ordered to ſtay till the writ of error be determined. Although it was held by THE COURT, as it has been ſeveral times here reſolved, that ſuch writ of error is no plea to ſuch action brought on the ſame judgment whereof the error is ſued. And ſaid by THE COURT, that ſuch actions of debt are not to be countenanced, unleſs there be good and ſufficient cauſe why they ſhould

Lev. 153. Ray. 100. Skin. 388. 590. 4 Mod. 247.

ROCK v. COOLING.

not take the ordinary courſe of ſuing out execution on their principal judgment (*a*).

(*a*) The court, pending a writ of error, will ſtay proceedings in debt on the judgment, even after judgment is ſigned, Taſwell v. Stone, 4 Burr. 2454. So on the defendant confeſſing judgment in the ſecond action, and undertaking not to bring a writ of error, they will ſtay the execution until the determination of the writ of error depending, Gribble v. Abbot, Cowp. 72. unleſs it appears to have been brought merely for delay, Entwiſle v. Sheppherd, 2 Term. Rep. 78. Carter v. Roberts, 2 Term Rep. 79, note (c); but the confeſſion of the defendant, 4 Burr. 2454, *ut ſupra*, or the oath of the plaintiff that it was brought merely for delay, ſeems not ſufficient, Chriſtie v. Richardſon, 3 Term Rep. 78. The Court, however, has refuſed to ſtay proceedings againſt the bail pending a writ of error on the judgment againſt the principal, on the confeſſion of the principal, that the writ of error was brought purely for delay, Pool v. Charnock, 3 Term Rep. 79. Kempland v. Macauley, 4 Term Rep. 436. Evans v. Gilbert, 4 Term. Rep. 436, *notis*.

Caſe 41. Dingley *againſt* Halſe.

In debt againſt an executor, if a *devaſtavit* be returned, and there be judgment *de bonis propriis*, he may be held to *ſpecial bail* in an action on the judgment.

1 Vent. 351.
1 Sid. 63.
1 Lev. 39.
Carth. 264.
1 Mod. 16.
1 Salk. 98.
Comb. 206.
Tidd's Pract. 49.
3 Term Rep. 685.

DEBT againſt an executor; no aſſets pleaded; aſſets found; and, upon *a devaſtavit* returned, there is judgment againſt him *de bonis propriis:* the plaintiff brings a new action of debt upon that judgment, reciting all that matter, and laid it in the *debet* and *detinet*. *

RESOLVED, That the defendant is bound to put in *ſpecial bail* though an executor; becauſe there might have iſſued a *fieri facias de bonis propriis*. And though this be a new way to recite, &c. yet THE COURT knew no inconvenience in it, it being now become the executor's own debt: the ſole reaſon why executors are not bound to put in ſpecial bail, is becauſe *non conſtat* whether they have *aſſets* or no; but the jury having found aſſets, they ought to put in ſpecial bail to an action of debt on ſuch judgment.—RULED by the whole Court.

* [56]

Caſe 42. Anger *againſt* Brookhen.

Qu. Whether a verdict given for £. 100 damages, and 6 *d.* coſts, and judgment to recover his damages aforeſaid to £. 100, and £. 10 *de incremento* be good.

S. C. Poſt, 88.
S. C. 1 Vent. 348. 350.

ERROR. The verdict was *damna* one hundred pounds, and *pro miſis et cuſtagiis* ſix pence. The judgment was, that he do recover *damna ſua præd' ad cent' libras, et pro increment'* ten pounds.

Error aſſigned that there was no judgment for the ſix pence.

And THE COURT inclined that *ad cent' libras* ſhould be *ſurpluſage*, and then *damna ſua prædict'* would be well enough; if it had been *recuperet damna ſua præd' ad valentiam* ten pounds; the *ad valentiam* ſhould be void, and the plaintiff ſhould recover all. In *Oſborne's caſe* it was only *damna ſua* without *præd'*, and ſo it could not have

S. C. 2 Jones, 128. S. C. Ray. 387. S. C. 2 Danv. 456. 1 Vent. 132. 337. 362. Ray. 388. Yelv. 109. 1 Saund. 285. 2 Saund. 171. 379. Barnes, 274.

reference

reference to any certainty, if you leave out thoſe words *ad*, &c. (*a*).

NOTE, That caſe of *Oſborne v. Exton* (*b*). Error upon a judgment in the King's Bench in Ireland, where the jury gave ten ſhillings and ſix pence for damages and coſts, and the judgment entered was *quod recuperet damna ſua per juratores aſſeſſ. ad valorem* ten pounds, and no notice was taken of the ſix pence, nor was that part releaſed; and it was held naught, becauſe damages and coſts are all *damna*, and both included by that word in the judgment. And judgment was reverſed, *niſi*.

NOTE ALSO the caſe of *Webb v. Webb* (*c*), where error was brought upon a judgment by default in caſe in the court of Common Pleas, and the error aſſigned here was, that the jurors upon the writ of inquiry had aſſeſſed more damages than were laid in the declaration; and the judgment being *Quod recuperet damna ſua prædict' per juratores prædict' aſſeſſ.* &c. was * naught.

* [57]

And for this error the judgment was accordingly reverſed.

But obſerve, that in this laſt caſe the plaintiff might, between the verdict and the judgment, have releaſed the ſurpluſage of the damages here meant, and ſuch releaſe being entered upon the record, would have rendered the judgment well enough. *Vide Yelv.* 45.

(*a*) It is ſaid, S. C. Raym. 388, that this error was not allowed; but that the judgment was reverſed for want of a proper *venire*, S. C. 2 Jones, 129. S. C. 1 Vent. 350. It ſeems, however, by the report, S. C. Poſt, 88, that the judgment was reverſed for this error in entering the judgment. But Sir B. Shower adds *tamen quære*.

(*b*) Mich. Term, 30 Car. 2. Roll, 504. in the King's Bench.

(*c*) Mich. Term, 29 Car. 2. in the King's Bench.

Whitfield *againſt* How.

Caſe 43.

EJECTMENT. The caſe was, A. being ſeiſed in fee covenants to ſtand ſeiſed to the uſe of himſelf in tail, and after the determination of that eſtate to the uſe of him for forty years, &c. reſerving A POWER "by proviſo, that it ſhould and might be lawful to "and for him and his aſſignees of that term to make leaſes for "twenty-one years or three lives;" A. aſſigns the term; the executor of the aſſignee aſſigns over to J. S.

If a power be given to a leſſee for years *and his aſſigns* to make leaſes for twenty-one years or three lives, and he aſſigns the term, the power goes to the *executor of the aſſignee*, and to the *aſſignee of the executor*.

The queſtion was, If J. S. being the aſſignee of the executor of the aſſignee, may make leaſes for twenty-one years by virtue of that power?

SAUNDERS argued, That he cannot take advantage of the power reſerved: the power ought to be conſtrued ſtrictly, and ſhall only go to the immediate aſſignees of A. To run to the aſſignee of the executor

S. C. 2 Jones, 110. S. C. 1 Vent. 338, 339. Hard. 415. 2 Mod. 317. Dougl. 292. Powel on Powers, 374.

WHITFIELD v. HOW.

ecutor of an aſſignee is further than an aſſignment of commiſſioners of bankrupts can go.

DOLBEN *Juſtice.* That is a queſtion, and that alſo differs from our caſe here; for they are not aſſignees of the party, but do come in, in *the poſt.*

JONES *Juſtice.* This power is not bound up to the perſons, but is annexed to the term:

And it was agreed by JONES, DOLBEN, and PEMBERTON, *Juſtices*, (SCROGGS *Chief Juſtice* abſent) that the aſſigns of the executor of the aſſignee had power to make leaſes; and judgment was ordered accordingly, *niſi*, &c.

MR. SAUNDERS however the next term argued it again, and urged, that, at common law, a covenant could not be aſſigned over for default of * privity. If a man deviſe a term to his executor, and that he ſhall have power to make leaſes, and dies, and the executor proves the will and makes another executor and dies; the ſecond executor is executor to the firſt teſtator, and ſhall have the benefit of the term; yet he conceived it clear by the books that he ſhould not have this power of making leaſes. He alſo cited this caſe, If a man have power to revoke by the conſent of four, and one of them dies, that now the party could never revoke. And he urged that the caſe in queſtion was much ſtronger; and ſhould theſe remote aſſignees have the power, then he that comes to have the term upon a *fieri facias*, or if he were outlawed, and the king ſhould grant over his term, or keep it himſelf, all theſe might make leaſes.

* [58]

POLLEXFEN argued on the other ſide, That MR. SAUNDERS's conſtruction might hold true in caſe of *naked powers*, but this was not ſo, it is coupled with an *intereſt* and annexed to the term; and upon the account of it the term was more valuable.

Under a power to demiſe land for three lives, reſerving the ancient rent of *ſix pounds* a year, a leaſe of the land, *inter alia*, reſerving *proinde* the *ſix pounds* rent, is good; for the reſervation ſhall be intended for the *land* only, and not for the *other things* alſo demiſed.

SAUNDERS then urged ANOTHER EXCEPTION, which was, that he, *inter alia*, *dimiſit* the five acres *reddend' et ſolvend' proinde*, &c. now that *alia*, may be ſomewhat out of which a rent is not iſſuable, or if it be rentable, then the rent muſt be apportioned; and ſo not the ancient accuſtomed rent reſerved for the five acres according to the power.

POLLEXFEN, as to this exception ſaid, that in one leaſe may be ſeveral *reddendums*, and when a man ſays that "*inter alia dimiſit* five "acres *reddend' proinde*, &c." the *proinde* ſhall relate to the five acres only.

JONES *Juſtice* held this the ſtrongeſt objection, for that "*proinde*" was the moſt common and general word uſed in leaſes for all the things demiſed.

But as to the other they all continued of the ſame opinion.

S. C. Skin. 34. 2 Roll Abr. 262. 5 Co. 3. Moor, 197. Vaugh. 35. 2 Lev. 150. 8 Mod. 249. Fort. 332. Dougl. 543. 3 Term Rep. 665.

PEMBERTON

PEMBERTON *Juſtice*, as to the *proinde*, remembered SAUNDERS of the caſe where were manors, lands, and a fair was let without a rent reſerved generally, and it was conſtrued to ariſe out of the manors and lands, and not out of the fair at all. WHITFIELD v. HOWE

And afterwards, that exception being waived, the counſel referred the conſtruction * of the power to the court as the thing they inſiſted on: * [59]

And about the end of the term THE COURT delivered their opinions again; that the aſſignee of the executor of the firſt aſſignee was within the benefit of the proviſo, and had the power to make leaſes; ſaying withal, that *a deviſee* was *an aſſignee* in law.

Oſbourne *againſt* Rey. Caſe 44.

CASE for ſlanderous words, *pro eo* that the defendant did go to a juſtice, &c. and ſaid, "I have loſt ſome ſheep, and do ſuſpect one *John Oſborne*," *innuendo* the plaintiff, and thereupon procured the aforeſaid *John* to be arreſted.

Slander laid to be ſpoken of one A. B. *innuendo* the plaintiff, is not ſufficient, without averring that A. B. was the perſon ſpoken of. S. C. 1 Vent. 337. Moor, 63. 2 Bulſt. 82. 3 Bulſt. 72. Cro. Eliz. 378. Cro. Jac. 107. 673. Cowp. 276. 1 Viner's Abr. 520 to 528.

After verdict, it was moved in arreſt of judgment, that the *innuendo* is not a ſufficient averment that the plaintiff was the party which the defendant meant by one *John Oſborne*, and no *colloquium* or communication laid, &c. So for ſaying "thy landlord is a thief," an action will not lie unleſs the plaintiff aver, that he at the time of ſpeaking of the words was landlord to the party to whom the words were ſpoken. "Forſworn before ſuch a judge;" not actionable without laying of what court, and averring a cauſe to be depending, &c.

And judgment was ſtayed in the principal caſe.

Hull *againſt* How. Caſe 45.

ERROR on a judgment in Common Pleas by default, and writ of enquiry. An exception was taken that there were but eleven jurymen mentioned: And it was allowed to be error. Judgment erroneous. Poſt, 180.

The ſame would it be if *twelve* were written in figures (*a*). *Engliſh* figures not allowed while records were in *Latin*.——Cro. Eliz. 85. 185. 1 Sid. 40. 2 Lev. 102. 1 Salk. 195.

(*a*) But ſee Raym. 20.

The

Caſe 46.

* The King *againſt* * * * * *

* [60]

The ſheriff's return to *conſtare facias* is evidence that a nuiſance is removed.

RESOLVED, That in caſe a man come hither to receive his fine upon a conviction of a nuiſance, he ought not to be fined before he removes it, and has ſued out a *conſtare facias* to the ſheriff, and obtains a *conſtat* returned that it is removed.

Certificate of two juſtices evidence that a highway is repaired.——Dougl. 56. 58.

But in caſe of repairing an highway a certificate from two juſtices of the peace next adjoining that the way is repaired, and affidavit that they ſigned the certificate produced is ſufficient.

Memorandum.

Outlawries reverſed. Poſt, 68.

This term ſeveral outlawries were reverſed for want of *procom'* (*a*), or *nec eorum aliquis* (*b*), or *per judicium coronator'* (*c*).

The King *againſt* Read.

Outlawry reverſed, becauſe the *year* in the *exigent* was in *figures*. Ante, 59.

And the like in *Eaſter* term following, for that in *the exigent* the year of our Lord was written in *figures*, and not in words at length.

(*a*) 1 Shower.

(*b*)

(*c*) Cro. Jac. 528. 531. See Rex v. Yandell, that the *names* of the coroners need not be ſubſcribed to the judgment of outlawry; but the judgment muſt appear on the record to have been given by the coroners, 4 Term Rep. 521.

Trinity

* Trinity Term, * [61]

The Thirty-firſt of Charles the Second,

IN

THE KING's BENCH.

Sir WILLIAM SCROGGS, *Knt. Chief Juſtice.*

Sir THOMAS JONES, *Knt.*
Sir WILLIAM DOLBEN, *Knt.*
Sir FRANCIS PEMBERTON, *Knt.*
} *Juſtices.*

Sir WILLIAM JONES, *Knt. Attorney General.*
Sir FRANCIS WINNINGTON, *Knt. Soliditor General.*

Adams *againſt* Staley.

Caſe 47.

On a general ſubmiſſion of "all controverſies," an award to pay a ſum of money in ſatisfaction of a debt due from a third perſon is bad. S. C. 2 Lev. 235. S. C. 1 Danv. 545. Cro. Eliz. 4. 758. 1 Lev. 58. 1 Saund. 33. 2 Saund. 292.

DEBT upon an award, and verdict for the plaintiff.

The award was laid to be, that the defendant ſhould pay thirty pounds to the plaintiff out of the eſtate of *Wolley*, and the ſubmiſſion was general of "all controverſies," and no mention made therein of the ſubmiſſion of *Wolley*, or any thing that the defendant had of his eſtate, nor any thing of his being liable to pay debts of *Wolley*'s; ſo that the award exceeds the ſubmiſſion: a man may ſubmit for another's debt, but then it muſt be mentioned in the ſubmiſſion. The court here is to be judge of the record before them, and not upon affidavits that more was ſubmitted than is expreſſed.

Judgment was arreſted.

3 Lev. 188. 1 Salk. 74. Kyd on Arb. 92, 104, 113. 4 Term Rep. 146.

Harvey

Caſe 48. Harvey *againſt* Harvey.

Error on a judgment in dower.
S. C. Ray. 366.
S. C. 2 Jones, 121.
Poſt 168.
N. Lut. 226. 230.

WRIT OF ERROR on a judgment in a writ of dower in the Common Pleas, where the tenant pleads an eſtate for life ſettled on the demandant, and avers it was in lieu of dower, *viz.* for her jointure: upon this iſſue was joined; and, at the *day in bank*, the tenant made default; upon * that iſſues a *petit cape*, which being returned judgment was given for the demandant, and a writ of *ſeiſin*; then a writ of enquiry was to the damages; and common error aſſigned.

* [62]

MR. POLLEXFEN urged ſeveral errors *ore tenus*.

FIRST. The want of an original, and the want of continuances.

SECONDLY. The demand of lands lying in three vills, and the *venire* but out of one.

THIRDLY. The *petit cape* is of a third part of a manor; and as to the other lands a third part of a moiety; and the return is *virtute brevis domini regis mihi direct' cepi in manus tertiam partem tenement' infra ſpecificat'*.

FOURTHLY. That the demand is of thirty acres of paſture, and ſo is the judgment and writ of ſeiſin, but the writ of enquiry for damages is only for twenty acres.

MR. SAUNDERS *è contra*.—FIRST, The original is certified by *certiorari*, but no continuances; if they had inſiſted upon it that there were no continuances, we could have got them certified too; the continuances are with the Lord Chief Juſtice, and we needed no *certiorari* to him, becauſe all that was ſtood on was want of an original.

SECONDLY. As to the *venire facias*, though it be not helped by the ſtatute of jeofails, becauſe no verdict in the caſe, and here judgment was by default; yet it being ſo, at common law, whether the *venire* be right, or whether the jury came out of a right vill, is not material, when there is no verdict in the caſe, and judgment is by default as here.

THIRDLY. As to the *petit cape*, and a return of the third part of the lands *infra ſpecificat'*; the *petit cape* is to ſeize a third part of ſome, and a third part of the moiety of other lands, and to ſummon the tenant to hear judgment; ſuppoſe the ſheriff ſhould ſeize the whole lands and ſummon the tenant, the tenant is well ſummoned, and upon that judgment is given; certainly it ſhall not make the whole naught becauſe he does more than he ought.

FOURTHLY. As to the writ of enquiry that is only for damages ſince the death of the huſband; and notwithſtanding that, the judgment is good as to the dower, and * will not be affected with any thing about damages.

* [63]

HARVEY v. HARVEY.

LORD CHIEF JUSTICE. If a man demand a third part of the moiety of a rent, and the return is of a third part of the whole rent, and judgment is of a third part of a moiety, and ſo purſuant to the *præcipe*, we ſhall intend that he ſeized a third part as it was demanded. Beſides the return is *tertiam partem tenementor' infra ſpecificat'*, and not *ſpecificatorum*, and therefore it ſhall refer to *partem* and not to *tenementor'*; and then it is well enough, *tertiam partam tenementorum infra ſpecificatam.*

PEMBERTON *Juſtice.* As to the *venire*, there is no mis-trial in the caſe, and ſo cannot be error when judgment is by default, and it is not a void, but a voidable *venire*, and therefore may well enough make a good continuance; and it will be and can be avoided only when there is a mis-trial, which is not in our caſe.

Adjornatur (*a*).

(*a*) It appears, Raym. 366, that in Eaſter Term, 32 Car. 2. it was moved again, and the judgment affirmed.

Stead *againſt* Berier. Caſe 49.

WRIT OF ERROR to reverſe a judgment in ejectment in the Common Pleas, when SCROGGS was *puiſne judge* there, and againſt his then opinion.

A. having a *ſon* and a *grandſon*, both of the name of *Robert*, deviſes lands to his *ſon Robert* and his heirs. *Robert* the ſon dies in the life-time of the teſtator. The teſtator afterwards republiſhed his will, and *animo teſtandi* declared that *Robert* his *grandſon* ſhould have the lands which were given to *Robert* his ſon. THE GRANDSON cannot take the lands thus deviſed; for by the death of THE SON the deviſe to him was void, and therefore could not be revived to the grandſon by the *parol declaration.*

The caſe was this—A grandfather has a ſon called *Robert*, who has a ſon called *Robert:* the grandfather makes a will, and gives his eſtate to his ſon *Robert*, who dies in his life-time. He then makes a codicil, and thereby gives two cloſes to his couſin *Judith*, and the ſame day he republiſhes his will, and *animo teſtandi*, declares that *Robert* the grandſon ſhould have the lands which he had given to his ſon *Robert.*

The queſtion was, Whether the grandſon ſhould take by this deviſe:

BALDWIN *Serjeant* for the plaintiff in the writ of error. It is againſt the expreſs words of the ſtatute of 32 Hen. 8. c. 1. that lands ſhould paſs by deviſe without will in writing. A parol declaration may deſtroy or make void a will, but can never ſupport or ſet up a will: if it be good it muſt work a great deal of violence; Firſt, It muſt amount to a new will in writing; and, ſecondly, it muſt take away the effect of the codicil * which was made the ſame day: he

S. C. 1 Freem. 292. 477. S. C. 1 Eq. Abr. 407. S. C. 2 Lev. 243. S. C. Pollexf. 546. S. C. Ray. 408. S. C. 2 Vent 341. S. C. 2 Mod. 313. S. C. 2 Jones, 135. S. C. 1 Mod. 267. S. C. 3 Keb. 845. Moor, 353. Comy. 381. Prec. Chan. 441. 1 Vern. 23. 2 Vern. 106. 2 Peer Wms. 136. 332. 347. 383. 3 Peer Wms. 51. 354. 1 Stra. 25. 445. Ld. Ray. 438. Com. Dig. "Deviſe," (E. 5.) Cowp. 87. 480. 1 Bro. Ch. Cas. 296. Dougl. 31. Powel on Deviſes, 676. 678. Gilbert on Dev. 9. 4 Term Rep. 601.

cited

STEAD v. BERIER.

cited the caſe of *Brett v. Ridgden* (*a*), where it was adjudged, that the deviſee dying in the life of the teſtator, the teſtator's ſaying that the deviſee's ſon ſhould have the land, would not paſs to him the ſame, unleſs reduced into writing; and as for the caſe of *Fuller v. Fuller* (*b*), where the caſe was, A. deviſed his land to his ſon *Richard* in tail, remainder to *Edward*; and *Richard* dying in the life-time of A. A. ſays, "I will that my will ſtand good to the children of *Richard*, "as if he had over-lived me:" wherefore he ſaid, there being a remainder over it was not the teſtator's intention he ſhould take till the eſtate-tail ſpent: but in the caſe in queſtion, it is a fee, and the will is become void, and cannot be ſet up by a new declaration: and as for the caſe of *Beckford v. Pancourt* (*c*), there the words of the will paſſed all the lands he had in D. and the lands newly purchaſed were in D. alſo, and ſo the new publication is ſufficient, but here it is not ſo; here muſt be a new eſtate to the grandſon new created.

MR. SOLICITOR GENERAL. The ſole queſtion is, If this be a good republication: but if there be ſufficient operative words in a man's will written, the land ſhall paſs; an averment that will ſtand with the will ſhall be received, and ſo is *Cheyney's caſe* (*d*). Now to republiſh is all one with an original deviſe; and the ſame thing as if it had been writ over again, and here is no other perſon of this denomination but the grandſon; had no ſon *Robert* been alive at the making of the will, then *Robert* the plaintiff ſhould have taken as ſon, as reputed ſo and by that name.

SCROGGS *Chief Juſtice* continued in the ſame opinion as when in the Common Pleas, ſaying, that the ſtrength of the objection lies in the likeneſs of the name; whereas had the grandſon been named *Thomas*, he could never have taken, and can any one make two diſtinct perſons to be but one; the very parol declaration makes them two as really they were: it is apparent that the ſon intended in
* [65] the will was one, and the perſon named in the declaration * is another; I will allow ſuch a republication good in the caſe where a man gives all his lands to J. S. and then purchaſes other lands, and then republiſhes his will (*e*), becauſe there if he ſhould write it over again he would uſe the ſame words; but here he would have expreſſed it otherwiſe if he had wrote it a-new; he would never have ſaid theſe words, "I give to my grandſon what his father ſhould have had."

JONES *Juſtice* agreed with the Chief Juſtice.

DOLBEN *Juſtice* diſagreed, and conceived it of as much force as

(*a*) Plowd. 341, the ſecond reſolution of the Court, 345. S. C. 1 Eq. Abr. 215.

(*b*) Moor, fo. 353. S. C. Cro. Eliz. 422. S. C. Godolp. 57. S. C. 1 Eq. Abr. 215. See Hodgſon v. Ambroſe, Dougl. 337. Warner v. White, Dougl. 334, notis, and 1 Browne's Chan. Caſes, 219, notis.

(*c*) Moor, fo. 404. S. C. Cro. Eliz. 493. S. C. Gouldſb. 150. S. C. Godolph. 307.

(*d*) 5 Co. 68. S. C. Moor, 727. See 4 Term Rep. 604.

(*e*) Beckford v. Parnecott, Cro. Eliz. 493. See alſo 4 Term Rep. 604.

an original deviſe, and compared it to the caſe where a man deviſes to his ſon *John*, and he dies, and then he has another ſon chriſtened by the name of *John*, and republiſhes his will, and *animo teſtandi* declares that his younger ſon *John* ſhould take.

PEMBERTON *Juſtice* agreed with the other two juſtices, that it could never go to the grandſon. When we ſay generally *ſon* we do not mean *grandſon*, though it be improperly ſometimes ſo called. A *ſon-in-law* is called *ſon*; but ſuppoſe a man has a ſon called *Robert*, and deviſes lands to his ſon *Robert*, and then marries another wife who has a ſon called *Robert*, which is alſo commonly called ſon to the ſecond huſband, and his own ſon *Robert* dies; now would any man imagine that the republication of this ſhould paſs any thing to the *ſon-in-law*? Suppoſe the ſon had been alive, would thoſe words have paſſed to the grandſon? And who can tell me any reaſon why the grandſon ſhould have it the ſooner becauſe the father is dead rather than when he is alive, ſince a revocation is more eaſy than a transferring. At this rate of conſtruction I may write a man in my will forty years before he is born. And I take a great diverſity between averments and parol declarations to explain the original will.

MR. SAUNDERS, in Hilary Term following, argued it again, that although the *grandſon* may in ſome ſenſe be called *ſon*, yet he is not ſo in the teſtator's ſenſe in this will; for there he gives his land to his ſon *Robert*, and to his grandſon *Robert* a perſonal legacy.

*MR. HOLT *è contrâ*, argued that a bare republication of his will after the death of his ſon would have done it; and admitting that would not, yet a republication *eâ intentione* would have done it as here it is: if this were an original deviſe this perſon might now take by this deſcription as *a ſon*, though in truth he be *a grandſon*; now a republication has the ſame effect and operation as the making of a new will, not from the firſt time, but from the republication, and it ſhall have and bear the ſenſe it is capable of at the time of being republiſhed. He quoted 1 *Roll Abr.* 618. *pl.* 9; but that which he moſt relied on was *Dyer* 142. *b. Trevilian's caſe*. Then he argued that this was *eâ intentione*, to that very purpoſe, that *Robert* the grandſon might take, though an averment cannot be out of a will, yet the expoſition of a dubious ſentence may be from ſome matter collateral. *[66]

SCROGGS *Chief Juſtice* ſaid, I am not a whit ſtirred by what has been offered.

And the next term the opinion of THE COURT was delivered that *the grandſon* could not take by that deviſe, (*f*) and the judgment was reverſed by all THE COURT except DOLBEN *Juſtice*.

(*f*) See Goodright v. Wright, 1 Peer Wms. 397. 1 Stra. 25. 2 Eq. Caſ. Abr. 359. Prec. in Chan. 439. Hodgſon v. Ambroſe, Dougl. 323. Warner v. White, 1 Bro. Cha. Rep. 219 *notis*; and the caſe of Doe, on the demiſe of Turner, v. Kite, 4 Term Rep. 601.

Caſe 50.

The King *againſt* Sanchar.

If an alderman omitted to take the oaths and ſubſcribe the declaration at the time of his taking the oath of office, his election to ſuch office became abſolutely void, although the oaths or declaration were not *tendered* to him.

S. C. 2 Jones, 121.
S. C. Trem. 517.
1 Vent. 19. 77. 82. 302.
5 Mod. 404. 452.
6 Mod. 18.
2 Burr. 1015.
Cowp. 382. 393. 540.
1 Hawk. P. C. ch. 8. ſ. 1.

MANDAMUS to reſtore the defendant to the office of *alderman* in *Norwich*.

The caſe appeared, on the return, to be, that an alderman, being ſworn truly to execute the office, and having taken the alderman's oath, did not take the oath for renunciation of the ſolemn league and covenant required by the act of 13 *Car.* 2. *ſt.* 2. *c.* 1. &c. for corporations, until ſometime afterwards, *viz.* four years.

Two queſtions were made thereupon:

FIRST, Whether the oath ought to be tendered to him?

MR. HOLT *for the alderman* argued, that it ought; otherwiſe there is no default in the officer, and he was a good officer till refuſal of thoſe oaths. It may be taken at another time after the oath for the execution of the office; for the words of the act are, * "in default "of ſuch, then by two juſtices of the peace of the town, borough, "&c. if ſuch be, or otherwiſe by two juſtices of the county:" all which implies that it may be taken at different times.

SECONDLY, Another queſtion is, whether it be void, or only voidable.

MR. HOLT. The ſtatute of fines and that of biſhops leaſes are conſtrued to be only *voidable*, though the words "be *void:*" if an officer after election refuſe the oath for due adminiſtration, &c. if he will take it before any advantage is taken thereof it is well enough; and why ſhould it not be ſo in this caſe too?

* [67]

JONES *Attorney General è contra.* "Tender" muſt be conſtrued of the ſame ſignification with "adminiſter," which is joined therewith as exegetical one of another. Then the clauſe that comes after it clears all; "that for default thereof the office ſhall be void," if it were otherwiſe it would lie in the breaſt of the corporation to tender it or not, and the juſtices cannot be ſuppoſed ſo eaſily to know it, and there muſt firſt be complaint made; the not taking it by the party is a refuſal in law; a breach of one point of the act of parliament is a breach of the whole; and this would be to repeal the act, or at leaſt to fruſtrate its deſign.

And as to the other queſtion, the act does not ſay that the place ſhall be void, for then perhaps it ought to be avoided in a judicial way; but it is ſaid, "that the election and choice ſhall be void;" ſo that there is nothing appears whereby he is brought into the place: if there ſhould be a tender requiſite there is no penalty inflicted upon any for default of tendering: when the act ſays, "it ſhall be by him "that adminiſters the oath of office, and in default of ſuch, by two "juſtices;" it is to be intended all at one time.

KING v. SANTHAR.

SCROGGS *Chief Juſtice.* This is an act of parliament for our ſafety, and therefore to be favoured. The firſt point is of great weight, and therefore to be conſidered.—But as to the other point he and all the other judges agreed, that the office would be *void*, and not only and barely *voidable*.

Adjournatur.

NOTE. Here was mentioned the caſe ruled laſt Hilary Term; of *Every v. Norris*, VIZ. Error in a judgment in * debt on a bond. The error aſſigned was upon the 13 *Car.* 2. *ſt.* 2. *c.* 1. that at the return of the *venire* the ſheriff had not taken the oaths and ſacrament; AND RESOLVED, that the office ſhould not be void as to all the duties which he performed as ſheriff; for that it would be of ill conſequence if all judgments depending on his proceſs ſhould be reverſed for that default: and it was ſaid, that the ſtatute intended only that he ſhould take them when tendered, and be required to do ſo; and that it was the neglect of thoſe whoſe duty it was to tender; and therefore not error aſſignable. And the judgment was affirmed.

Quære tamen as to the tender.

Adjournatur. (*a*)

The acts of a ſheriff who has not taken the *oaths* required by the 13 Car. 2. ſt. 2. c. 1. though void as to *himſelf* are good as to *ſtrangers*.

S. C. Jones, 137. Ray 212. 2 Saund. 89. N. Lut. 54. 3 Keb. 602. 2 Jones, 81. 2 Lev. 242. 3 Lev. 116. 1 Hawk. P. C. ch. 8. ſ. 3.

* [68]

(*a*) It appears by the pleadings in this caſe under the title of Rex v. Thatcher, Tremain, 517 to 523, that the return was that the defendant was duly choſen an alderman of the city of Norwich on the 7th December, 16 Car. 2. that he then took the oath of office, and the three oaths appointed by 13 Car. 2. ſt. 2. c. 1. and recited and pronounced the declaration mentioned in the ſaid ſtatute concerning the ſolemn league and covenant; but did not then ſubſcribe the ſaid declaration; but that it being firſt offered to him to ſubſcribe on the 9th March, 30 Car. 2. he then ſubſcribed it; and that becauſe he did not ſubſcribe it when he was ſworn into office they choſe another alderman, &c. Sir Thomas Jones reports, 2 Jones, 121. that this cauſe of removal was allowed by the court: and by Rex v. Slatford, 5 Mod. 317. a tender of the oath is not neceſſary; the officer omits to take them at his peril, and by the words of the ſtatute the office is *void* by the non-ſubſcription of the declaration at the time he takes the oaths; but by 2 Salk. 428. a return ſetting forth that the party did not take the oaths before the mayor muſt add, "that he did not take them before two juſtices of the peace, &c. 1 Hawk. P. C. ch. 8. ſ. 1. Comb. 419. Holt, 438. But now by 5 Geo. 1. c. 6. "all perſons required to take the ſaid "oath, or ſubſcribe the ſaid declaration, "ſhall be confirmed in their reſpective "offices, and be free from all incapacities "and penalties, and none of their acts be "queſtioned notwithſtanding their omiſ- "ſion to take the oath or ſubſcribe the "declaration, &c. nor ſhall they be re- "moved by the corporation, or otherwiſe "proſecuted for having omitted to take "the ſacrament within one year next "before their election, unleſs ſuch removal "or proſecution be commenced within "ſix months after the election." And therefore if neither removal or proſecution take place within the time limited, the election becomes abſolute and unavoidable. Crawford v. Powell, 2 Burr. 1013. S. C. 1 Bl. Rep. 229. See alſo Rex v. Monday, Cowp. 539; the ſtatutes 25 Car. 2. c. 2. the 1 Geo. 1. ſt. 2. c. 13. the 11 Geo. 1. c. 4. ſ. 4. and 31 Geo. 3. c. 31. ſ. 18.

Caſe 51.

Buckley *againſt* Wilkinſon.

Eaſter Term, 29 Car. 2. Roll 543.

If an outlawry be reverſed, the party ſhall be reſtored to money levied on the *capias utlagatum*, although paid into the exchequer.
S. C. 2 Keb. 871.
S. C. 2 Jones, 100.
5 Co. 90.
Cro. Car. 328.
N. Lut. 15.
Co. Lit. 288.
Cro. Eliz. 164. 270. 278.
1 And. 277. 288.
Moor, 237. 269.
2 Lev. 49.
2 Vern. 313.
Cro. Jac. 246.
6 Com. Dig. "Utlagary," (c. 5.) 5 Mod. 61. 3 Bac. Abr. 778.

WRIT OF ERROR to reverſe an outlawry after judgment, and a *ſcire facias* thereon.

The queſtion was, whether the plaintiff ſhould be alſo reſtored to the money levied on the outlawry after its reverſal?

And it was argued that he ſhould, the original judgment being reverſed; for the outlawry is at the ſuit of the party, (*a*) and what the ſheriff ſeizes is to the party's uſe. (*b*) If it be in a perſonal action he forfeits only the profit of the lands and not the lands themſelves. (*c*) The king's intereſt is but conditional, and if the outlawry be reverſed the goods ſhall be reſtored alſo, and then the party is ſet where he was, as if the outlawry had never been.

But the contrary was urged to be the practice of the Exchequer.

To which THE COURT agreed, and there was *Brownl. tit.* "*Reſtitution*" 18. cited.

SEE the authorities cited in this caſe, *infra*, *note*, (*a*) (*b*) (*c*).

(*a*) Jennings v. Hatley, Yelv. 19. S. C. Cro. Eliz. 909. See alſo Leighton v. Garnons, Cro. Eliz. 706. Shaw v. Cutteris, Cro. Eliz. 850. Wolſe v. Daviſon, 5 Mod. 200. S. C. 2 Salk. 319.

(*b*) Year Book, 9 Hen. 6. pl. 20.

(*c*) Statham's Abr. "Outlawry," 6. Eyre v. Woodſine, Cro. Eliz. 278. S. C. 1 And. 277.

Caſe 52.

* [69]

Tenant after poſſibility reſtrained from waſte.
S. C. 2 Eq. Abr. 757.
S. C. 2 Freem. 53.

* Abrahal *againſt* Bubb.

UPON a bill in chancery, it was reſolved by FINCH *Lord Chancellor*, that tenant in tail after poſſibility of iſſue extinct, ſhall be reſtrained in equity from doing waſte, by injunction, &c. becauſe that Court will never ſee a man diſinherited: and he took a diverſity between where a man is not puniſhable for waſte, and where a man has right to do waſte. See *Eudale's caſe*, 24 *Car.* 1. ruled by the LORD ROLLE, and cited by him to warrant that diſtinction. (*a*)

Impey

(*a*) The anceſtor of the plaintiff ſettled the lands to the uſe of himſelf and his wife, and the heirs of their two bodies, and died without iſſue; the widow married the defendant, who, being tenant in tail after poſſibility of iſſue extinct, felled ſome trees in a grove that grew near, and was ornamental to the manſion houſe, and having an intent to fell the reſt, the plaintiff to whom the lands belonged in remainder applied for an injunction; and LORD NOTTINGHAM held that even a tenant for life without impeachment of waſte ſhould be reſtrained from pulling down houſes, or doing other waſte either *maliciouſly* or *extravagantly humourous*, although he had expreſs power given him to commit waſte by the act of the party; and he

Impey *againſt* Pitt. Caſe 53.

DEBT upon an obligation; the condition whereof was, to leave and bequeath to the obligee the third part of his eſtate, &c. The obligor joins him with two others as executor. The obligee dies inteſtate. The adminiſtrator of the obligee brings an action on that bond.

A condition to leave the obligee a *third part* of his eſtate, is not performed by the obligor making the obligee a *joint executor* with *two* other perſons.

The queſtion was, whether that were a performance of the condition? (*a*)

S. C. 2 Jones, 133.

ANOTHER QUESTION was, whether an adminiſtrator (*pendente lite* about a will) be liable to an action? And it was CLEARLY AGREED by all that he is liable, for that he is fully an adminiſtrator for the time, &c. (*b*)

An action lies againſt an adminiſtrator, *pendente lite* about a will.

Carth. 153. Stra. 917.

(*a*) It is ſaid S. C. 2 Jones, 134. that the Court ſeemed to be for the plaintiff, *ſed adviſare vult*.

(*b*) In the caſe of Frederick v. Hook, it is ſaid that adminiſtration granted pending a ſuit in the ſpiritual court concerning the *right of adminiſtration* is good, but that an adminiſtration granted *pendente lite* concerning *a will* is utterly void, Carth. 153. But it is ſaid that this caſe was never adjudged, Wollaſton v. Walker, Stra. 918. that the diſtinction taken is unfounded, S.C. Fitzg. 202. And it is adjudged that an adminiſtrator *pendente lite* touching a will may maintain actions for the recovery of debts due to the deceaſed, S. C. 2 Peer Wms. 576; for the appointment of ſuch an adminiſtrator is neceſſary to take care of the inteſtate's eſtate, 2 Atk. 286; and therefore, being the only legal adminiſtrator, while the letters are unrepealed, Wilſon v. Packman, Cro. Eliz. (459.) he may retain for his own debt, Stiles, 337. and is liable to actions by the creditors of the inteſtate, Ld. Ray. 661. See 1 Bl. Rep. 668.

The King *againſt* The Mayor and Bailiffs of Cambridge. Caſe 54.

MANDAMUS at the ſuit of *Mr. Peachy* of the *Inner Temple*, to be reſtored to the office of RECORDER of *Cambridge*, (which was by charter *ad terminum vitæ* or *ad voluntatem*) and they return, that they had power to chuſe a recorder by charter *ad terminum vitæ*, or *ad libitum*; and that ſuch a day they did chuſe him *ad libitum*; and that ſuch a day they did remove him.

To a *mandamus* to reſtore, a return that the party was removable *ad libitum*, without ſtating any other cauſe, is good, if warranted by *cuſtom* or *charter*.

———Ray. 188. 1 Sid. 461. 1 Vent. 77. 342. Cro. Jac. 540. 1 Lev. 291. 5 Mod. 404. 452. 6 Mod. 18. Ld. Ray. 1244. 4 Burr. 2040.

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he approved the opinion of ROLL C. J. in the caſe of *Eudale v. Eudale*, *Cro. Car.* 242. that trover would lie by the reverſioner againſt tenant after poſſibility of iſſue extinct for trees cut down by him; and he cited the *Biſhop of Winchester's caſe*, that a tenant for years, without impeachment of waſte, ſhall be reſtrained from cutting down trees in the laſt year of his term only; and *Lady Evelyn's caſe*, where the remainder man for life without impeachment of waſte, with the conſent of the leſſee of the tenant for life, entered and felled trees, and an injunction was granted, although he was not puniſhable in an action of waſte, S. C. 2 Freem. 53. 55. S. C. 2 Eq. Caſ. Abr. 757. See alſo 2 Chan. Caſes, 32. Packington's caſe, 3 Atk. 215. Prec. Chan. 454. 2 Vern. 738. Ambler, 508. 1 Brown's Caſes in Chan. 159. 166. 2 Com. Dig. "Chancery," (D. 11.) Chamberlain v. Dummer, 3 Brown, C. C. 549. Vane v. Barnard, 1 Term Rep. 56. cited.

KING v. MAYOR OF CAMBRIDGE.

MR. WALLOP took exceptions to the return, that they mentioned no cauſe.

* [70]

*THE COURT reſolved that they need not, if they had ſuch a cuſtom; they choſe him *habend' officium ad libitum eorum, &c.*

Here was cited *Blagrave's caſe*, the ſteward of *Reading*; (*a*) and in *Warren's caſe*, (*b*) it is ſaid, that where ſuch a cuſtom is, *a counſel*, &c. might be amoved without ſhewing any cauſe for it, (*c*) but not an *alderman*, or *freeman*.

AND IT WAS RESOLVED, that the cauſe returned was ſufficient. And LORD CHIEF JUSTICE ſaid, that *Mr. Peachy* knew this cuſtom well enough, and might have choſen whether he would accept it or not.

If a corporation have power to remove an officer *ad libitum*, they need not, in a return to a *mandamus*, ſtate *how* he was removed. Dougl. 159. 177.

ANOTHER EXCEPTION urged was, That it is not alledged how he was removed; and a corporation could do nothing but by deed or charter.

IT WAS ANSWERED, that he was removed as he was choſen, and in caſe he had been choſen by charter he muſt have been removed ſo.

And the return and cauſe were allowed. (*d*)

(*a*) 2 Sid. 6. 49. 72.
(*b*) Cro. Jac. 540. S. C. 2 Roll Rep. 112.
(*c*) See Rex v. Churchwardens of Thame, 1 Strange, 115.
(*d*) See Rex v. Churchwardens of Taunton St. James, where it was held a good return to a *mandamus* that the party was not duly elected ſexton according to *ancient cuſtom*; that the cuſtom was for the inhabitants to remove *at pleaſure*; and that he was removed purſuant to ſuch cuſtom, Cowp. 413. See alſo Rex v. Fawcett, 4 Burr. 2046. Rex v. Mayor of Canterbury, Stra. 674. Rex v. Mayor of Coventry, Salk. 430.

Caſe 55.

Wortley *againſt* Watkinſon.

Trinity Term, 30 *Car.* 2. *Roll* 483.

The ſpiritual court may proceed to diſſolve a marriage between a man and his *wife's ſiſter's daughter*; for it is within the Leviticaldegrees.

S. C. 3 Keb. 660.
S. C. 2 Lev. 254.
S. C. 2 Jones, 118.
Co. Lit. 235.
2 Vent. 9. 3 Lev. 364. 4 Leon. 16. Vaugh. 206. 250. 302. 329. N. Lut. 341. 1 Mod. 25, 26.

PROHIBITION. Upon a demurrer to the declaration the queſtion was, whether the marriage of a man with his *wife's ſiſter's daughter* be inceſtuous?

MR. SAUNDERS againſt the marriage and for the conſultation. The only ground of ſcruple is *Parſon's caſe*, (*a*) which ſays a *prohibition* was granted; but in that caſe there was rule for *conſultation* in Hilary Term two years after that; and certainly it is within the ſtatute 32 *Hen.* 8. *c.* 38; and in *Man's caſe*, (*b*) it is only ſaid that a prohibition went; but in *Croke* (*c*) the ſame caſe is reported, and there indeed a prohibition went, but afterwards a conſultation was awarded on ſtrong debate; and ſo was the *caſe of Remington* cited in the caſe *Bartlett v. Howard*, (*d*) and this was after *Parſon's*

(*a*) Co. Lit. 235.
(*b*) Hobart 907.
(*c*) Cro. Eliz. 228.
(*d*) Hob. 181.

caſe.

caſe. (e) *Lord Coke* (f) ſays a woman may not marry with her aunt's huſband; and that *caſe of Parſons* my LORD COKE reports it not as his own opinion; for it is otherwiſe in the *ſecond Inſtitute*.

MR. WALLOP. The marriage of a man's own niece is not within the expreſs words of the *Levitical law*, nor is there any expreſs caſe in our law that makes * a man's marriage with his own niece to be inceſtuous. In *Sir John Allington's caſe*, in the reign of *Charles the Firſt*, he was fined one thouſand two hundred pounds by the high commiſſioners, but a prohibition went: (g) it muſt therefore be parity of reaſon that muſt govern this caſe, for it is not expreſsly within the *Levitical degrees*. Now for parity of reaſon I do not wholly diſallow it, but offer theſe things concerning it: it is very difficult, if not impoſſible, to aſſign the true reaſon of the Levitical prohibition. Now parity of reaſon is a relative thing; therefore certainly we cannot give an account of that which is not expreſſed. (h) Thoſe who think they have found out the true reaſon do not agree. (i) They argue from *Leviticus* (k) that they are in equal degree. They take *non cauſa pro cauſa*: they make propinquity the only *formalis ratio* of all thoſe prohibitions. (l) But this can never be maintained, for if we conſider the firſt marriage we ſhall find that *Eve* was to *Adam* as his daughter. (m) Now if, in ſome caſes, marriages are unlawful, and others more unlawful, and both alike near, and others that are nearer, and yet lawful, then there muſt be ſome other cauſe for the prohibition beſides propinquity of blood; now couſin-germans are not prohibited.—Then they go upon another error in that they argue from the *right line* to the *collateral line*, and that is apparent in *Harriſon's caſe*. (n) It is true, that caſe is only about the degrees of conſanguinity, but yet affinity alſo works more ſtrongly in the lineal than in the collateral line; and that which is ſtrong in the caſe of the right line (o) will not work at all in the collateral line; there is no expreſs abſolute prohibition with the wife's kindred but in the right line. Another reaſon they draw from thoſe words in *Leviticus*: "For ſhe is thy near kinſwoman," (p) that therefore propinquity muſt be the formal cauſe. Now * by "propinquity" they muſt either mean the immediate next of kin, which cannot be according to them, for then we ſhould not be at all prohibited; or elſe it muſt be in the largeſt degree and ſenſe, and then all kindred whatſoever would be prohibited; it muſt be therefore kinſwoman *propinqua* in the right line, *i. e.* ſuch as may come to be thy mother or guardian. The right formal reaſon of

* [71]

* [72]

(e) 1 Roll Abr. 832.

(f) 2 Inſt. 683.

(g) Lord Vaughan ſays, "in the caſe of "*Sir Giles Allington*, he was deeply fined, "and a ſentence of divorce given for "marrying his brother or ſiſter's daugh-"ter, which I heard at *Lambeth* bou e, "and no *prohibition* was granted," Vaugh. 323.

(h) GROTIUS de Jure Belli et Pacis, book 11. ch. 5. par. 12. SELDEN de Jure naturali et Gent. Lib. 5. p. 594.

(i) See DR. HAMMOND in his ſixth *quere* concerning marriage, page 38.

(k) Leviticus, xviii. 17.

(l) SELDEN Uxor Hebraica, 25.

(m) SELDEN de Jure naturali et Gentium juxta Diſciplinam Ebræorum, 581.

(n) Harriſon v. Burwell, Vaug. 242.

(o) As SELDEN de Jure natu ali et Gentium, &c. ut ſupra, cap. 10. page 593. 594.

(p) Levit. xviii. 17.

WORTLEY v. WATKINSON.

thoſe prohibitions is, becauſe the order of nature would be inverted; and there is a great diverſity always taken between marrying an *aunt* and a *niece*, and between the marrying of a *wife's aunt* and her *niece*, (*q*) and the *Talmudiſts* do not hold a marriage between the uncle and his niece to be inceſtuous. (*r*) As to the *dilemma* in the caſe between *Wood v. Hill*, (*s*) I anſwer, that though it was not utterly unlawful, yet becauſe it is next to it, and looks like it, on that account the church might prohibit ſuch to be prieſts, (*t*) and for this reaſon did THE APOSTLES prohibit widows that had two huſbands, &c. This diverſity between *a niece* and *an aunt* does well anſwer *Dr. Hammond.* (*u*) Superior relations and vice-parents may not marry, becauſe they cannot both command and be commanded; ſo that one that may be a mother, cannot marry a nephew's ſon, but yet a vice-parent may marry a niece's daughter, becauſe he may command both ways. In the collateral line only the ſuperior relations cannot decently make wives, but in the lineal they may. For authorities it is obſervable, that THE ROMANS who were moſt ſtrict about marriages, and therefore not only forbid the marrying one's niece, (*x*) but the marriage of couſin-germans, and ſo they went further than we, yet did not prohibit the marriage of a wife's ſiſter's daughter. *Beza Franciſcus Connenus*, (*y*) gives an inſtance of *Sicilia* and *Miſylus*. He alſo cited the *caſe of Parſon's*, (*z*) and though as LORD VAUGHAN ſays (*a*) there was a conſultation granted, yet that was for a defect in the declaration, and ſo was that of *Mann's caſe*. The * caſe in *Hobart* is very dark; the words are "though there were cauſe;" it is nothing but a ſuppoſition; words ſpoken *obiter*. There is againſt me the ninety-ninth *Canon*, 1603, but I muſt ſubmit to you, whether a canon, paſſed in the convocation, and confirmed by the king only, and not by act of parliament, binds all the king's ſubjects. (*b*) No canon can preſcribe againſt a ſtatute, and therefore cannot make any thing within the degrees there prohibited that was not ſo before; for all marriages not within the Levitical degrees, &c. are by that ſtatute of 32 *Hen.* 8. *c.* 38. allowed good.

* [73]

SCROGGS

(*q*) Epiſcopus Theolog. Inſt. 37.
(*r*) Selden, 523.
(*s*) Hill v. Good, Vaugh. 312.
(*t*) "Qui duas ſorores duxit aut conſobrinam clericus eſſe non poteſt," Can. Apoſt. 18.
(*u*) Page 34.
(*x*) See Gilb. Rep. 158.
(*y*) Valerius Maximus, cap. 4. De Hominibus. See Dr. Taylor's Elements of Civil Law, 108. 314. 339.
(*z*) Co. Lit. 235.
(*a*) Vaugh. Rep. 248.
(*b*) By 25 Hen. 8. c. 19. The clergy ſhall not preſume to claim or put in uſe any canons, except made by the royal aſſent in convocation aſſembled by the king's writ; nor ſhall any canon, repugnant to the king's prerogative, the laws, the cuſtoms, or the ſtatutes of the realm, be allowed. And upon this ſtatute the authority of the canon law of England is ſaid entirely to depend. Law Gram. 132. THE CANONS of 1603, were made in a convocation of the province of *Canterbury*; were ratified by king James the firſt; and afterwards adopted by the province of *York*; but were never confirmed in parliament, Pref. 1 vol. Burn's Ecc. Law XV. Theſe canons, it is ſaid, have always been received, Ld. Ray. 449. and no doubt ever made of them, 1 Salk. 134. with reſpect to their binding *the clergy* in matters of eccleſiaſtical cognizance, though only confirmed by the king. Biſhop of St. David's v. Lucy, Carth. 485. but that *the laity*, not being repreſented in convocation, are not bound by them, they not having been confirmed in parliament.

§

SCROGGS *Chief Juſtice* ſaid, that he was apt to think really thoſe prohibitions were partly for avoiding confuſions which would enſue by having perſons both commanding and commanded, and had it not been for thoſe, how could any law have determined the courſe of deſcents, and who ſhould be heir and inherit?

JONES *Juſtice*. I think that propinquity was the reaſon of prohibitions, and to me it ſeems clear, that we ought to reverence and follow the judgment of the church of *England*; and all along ſince the making of the ſtatute of 32 *Hen.* 8. *c.* 38. the eccleſiaſtical courts have put this up in their tables amongſt the inceſtuous marriages, and have always reckoned it ſuch; and all our doctors and divines do account it ſuch.

DOLBEN *Juſtice*. It, being of great weight, deſerves to be ſpoken to again; but I wonder our clergymen do not get an act of parliament for the ſettling thoſe marriages, ſince doubtleſs they may ſo eaſily have it. I know ſeveral marriages of the like kind that are not yet in queſtion.

PEMBERTON *Juſtice*. It is fit I think to be ſpoken to before all the judges; and (MR. WALLOP) your cauſe depends wholly on this, that the conſultations were granted for defects of or in the declarations; for thoſe precedents will be our guide. However, I ſhall be cautious in the matter; for there are three or four children in this marriage which muſt be all baſtardized if this marriage be inceſtuous. But this is not of record; and this is not a ſingle caſe; but a general queſtion of great conſequence, and * fit to be argued again. * [74]

Adjornatur. (*c*)

parliament, Mathews v. Burdett, 2 Salk. 412. 672. Cox's caſe, 1 Peer Wms. 32. Philips v. Bury, Ld. Ray. 7. Britton v. Standiſh, 6 Mod. 190. It ſeems, however, that doubts ſtill remained upon this point; but in the caſe of Middleton and his wife v. Crofts, in Mich. Term, 10 Geo. 2. it was determined that the canons of 1603, not having been confirmed by parliament, do not *proprio vigore* bind the laity; but that when any of their proviſions are declaratory of the ancient uſage and law of the church of England received and allowed here, the laity are bound by thoſe laws as being part of the common law of the realm; their obligation ariſing antecedent to, and not from this body of canons, 2 Atk. 650 to 675. 4 Viner's Abr. 320. 2 Stra. 1056. Caſes T. H. 57.

(*c*) S. C. 2 Lev. 254. ſays the marriage was betwixt *Watkinſon* and the *daughter of his firſt wife*. But S. C. Keb. 660. and S. C. 2 Jones, 118. agree with *Sir B. Shower*, that it was with his *wife's ſiſter's daughter*; and by all the reports, it ſeems that A CONSULTATION was awarded, becauſe within the Levitical degrees. See Watkinſon v. Mergatron, Raym. 464. 2 Jones, 191. Skin. 37. A conſultation was granted for like cauſe in Howard v. Biſhop Saliſbury, 1 Mod. 25; the ſame in the caſe of Snowling and his wife v. Nurſey, N. Lutw. 340. 2 Lutw. 1075; a prohibition decreed for the like cauſe in Denny v. Aſhwell, Strange, 53; See alſo 1 Ld. Ray. 68. 3 Burn's Ecc. Law, 434. and note (1) Co. Lit. 235. a. 5 Mod. 548. and Ellerton v. Gaſtrell, Comy. Rep. 318.

The

Caſe 56. The King *againſt* The Surrey Juſtices.

A mandamus lies to an inferior juriſdiction or officer to do any act which he is required by law to do.

1 Wilſ. 125. 233. Stra. 113. 835. Fitz. 85. Andr. 279. 2 Term Rep. 239.

SIR FRANCIS WINNINGTON moved for a *mandamus* to the juſtices of the peace of *Surrey*, commanding them to diſcharge a priſoner upon the late act for relief of the poor priſoners, or elſe to return the cauſe why not.

The caſe was thus, the party was in cuſtody the twenty-ninth day of *May*, but the debts were contracted afterwards; all the creditors were ſummoned. The juſtices were doubtful, though the words of the ſtatute are plain, "for all debts contracted before the diſcharge, &c."

SIR FRANCIS urged, that this court has juriſdiction over all inferior courts, and cited *Bagg's caſe*, 11 *Co.* 93. It is the happineſs of the ſubject that there is a King's Bench: no caſe ſo final there but you may have an inſpection over them; you have and may again command them to do juſtice. *Mandamus's* have gone to prohibit them, &c. You command *the ordinary* to grant letters of adminiſtration, &c. (*a*) You have ſent *mandamus's* to juſtices of the peace about baſtard children: (*b*) be it what it will, if matter of government, they are under your power; and whereſoever a man has a right (as the party has here upon ſwearing, &c. and ſummoning his creditors, to be diſcharged) the law gives him a remedy. (*c*)

Rex v. Carter, 4 Term Rep. 246.

SCROGGS *Chief Juſtice*. If it had been a total omiſſion of their duty, as refuſal to conſider the petition, or to examine the matter, or the like, we might command them by a *mandamus*. (*d*) But when they have examined the matter, it is hard for us to enjoin them one way or other, they having the conuſance of the thing. (*e*)

PEMBERTON *Juſtice* was of this opinion.

But however SCROGGS *Chief Juſtice* ſaid, We may ſend a *mandamus* to them to diſcharge the priſoner or return the cauſe, and ſo we may after leave it to them when it is before us.

And a *mandamus* was granted accordingly by SCROGGS *Chief Juſtice*, JONES and DOLBEN *Juſtices*, PEMBERTON *Juſtice volente*.

(*a*) Ante, 48. Rey. 235. 2 Roll Rep. 207. 1 Sid. 281. 372. 1 Lev. 187. 1 Bl. Rep. 640. 668. 5 Com. Digeſt, 8vo edit. 24.

(*b*) 1 Vol. Mr. Coſtà's edit. of Bott's Poor Laws, p. 46. 61. 207.

(*c*) 3 Burr. 1265. 1 Bl. Rep. 352. 552. Comp. 378.

(*d*) Therefore the court will grant a *mandamus* to the keepers of the common ſeal of either of the univerſities, commanding them to put it to the appointment of high ſteward, Rex v. Ch. of Cambridge, 3 Burr. 1647; to the warden of a college to compel him to put the common ſeal to an anſwer of the fellows in chancery contrary to his own ſeparate anſwer put in, Rex v. Wyndham, Comp. 377; to a lord of a manor to hold a court baron, 1 Bl. Rep. 300; to commiſſioners of the land tax to elect a clerk, 1 Term Rep. 146; to *a viſtor* to hear an appeal and give ſome judgement, Rex v. Biſhop of Lincoln, 2 Term Rep. 338. *notis*.

(*e*) See Blackborough v. Davis, Comy. Rep. 96.

But

But always ſince THE COURT has refuſed to intermeddle in that act, and put them to their *audita querela*.

KING v. SURREY JUSTICES.

* Preſcott *againſt* Pemberton.

Caſe 57.

* [75]

COVENANT that the plaintiff ſhould have the firſt quarter's rent due at *Lady-day*, after the date of the deed; the breach aſſigned was that the defendant *obſtruxit et impedivit eum* (the plaintiff) *a recipiendo*, &c.

On a covenant to have rent, *Qu.* if ſtating that the defendant *obſtructed* and *hindered* the receiving of it, is inſufficient. Poſt 77. 1 Roll Abr. 425. 3 Leon. 38. 1 Salk. 139, 140. Hob. 35. Cro. Jac. 170. 383. 5 Mod. 133. N. Lut. 95. 93. 4 Mod. 44. 1 Show. 252.

MR. DARNELL moved in arreſt of judgment, becauſe the plaintiff ſhews not how he was hindered; and he cited the caſe of *Shordiſh v. Faldoe*, 1 *Bulſt.* 139, and *Penn v. Glover*, *Cro. Eliz.* 421.

SIR C. LEVINZ *é contra*. I confeſs that "*non permiſit*" is too general, for there is no act done (*a*); but by "*impedivit et obſtruxit*," it is clear that ſome act was done to the plaintiff's hinderance, which act the defendant beſt knows himſelf.

Adjournatur.

(*a*) 1 Roll Abr. 425. 430. 3 Leon. 38. See Hughes v. Richman, Cowp. 125.

The King *againſt* Bettſworth.

Caſe 58.

INDICTMENT for refuſing the office of high conſtable; ſpecial verdict.

A tenant in *ancient demeſne* is not privileged from ſerving the office of *high conſtable*. S. C. 1 Vent. 344. S. C. Trem. 221. 223. F. N. B. 161. 376. 1 Mod. 13. 5 Mod. 96. 179. 6 Mod. 96. 2 Saund. 290. 1 Salk. 175. 380. Cowper 13.

The queſtion was, whether a tenant in *ancient demeſne* may be made conſtable of a hundred which reaches further than the demeſnes? He is freed from payment of toll; from payment of wages to knights of parliament; from being upon juries, &c; and the reaſon of all this is, becauſe he ſhall not be drawn out of the *ancient domaines*, where his employment was by the ancient law ſuppoſed to be; the ſame reaſon is here: if he had other lands, it is true, he would be liable.

JONES *Juſtice*. I wonder the privilege was never claimed: now he is tenant of the king's, and this is an office for the king, and it therefore may be a queſtion: it has been a doubt in our books, whether he may not be a juryman in perſonal actions; and ſaid, that none can be tenant for years and hold in demeſne.

Adjournatur.

In Michaelmas term following it was argued again by MR. SAUNDERS, who added to what he urged before, that a tenant in *ancient demeſne* is diſcharged from toll, pontage, and murage (*a*).

(*a*) Fitz. N. B. 168.

In

KING v. BETTESWORTH.

* [76]

In the *Regiſter* (*b*), there is a writ to diſcharge him from attending * the ſheriff's turn or leet out of the manor; now a conſtable was an officer at the common law, and eligible at the court-leet, and in many places they are choſen ſtill there (*c*). They are not to appear in any other turn out of the manor. Serving on juries is a neceſſary part of juſtice for the trial of men's cauſes, and yet they are exempted.

MR. POLLEXFEN *é contra.* We muſt underſtand the *ſecond inſtitute* (*d*), and its general words there *ſecundum ſubjectam materiam*, i. e. ſerving on juries; not that they are exempt from obeying the ſummons and warrants of the ſeſſions; and they muſt appear there in caſes of the peace: I agree to thoſe privileges, but thoſe are not perſonal, they are only annexed to the land; for merchandizes and things that ariſe out of the land they ſhall pay toll; that of juries is only that thoſe lands which they hold in *ancient demeſne* ſhall not render them liable, but if they have other lands they may (*e*). As to this of conſtable, we have no caſe about it, but I think the ſtrongeſt authority to be that *high conſtables* were not before the *ſtatute of Wincheſter* (*f*); there are different opinions about it, but the ſtatute ſeems expreſs, and my LORD COKE in his *fourth Inſtitute*, and *Mr. Lambard*, an ancient writer, are of his opinion; and this office is nothing relating to the land, for a man may be an *idoneus homo* for this office, if he have ſubſtance in other things than land.

THE COURT. The being of a jury has not ſuch immediate relation to juſtice as the office of a conſtable, which is for the preſervation of the peace and government; this being an high conſtable is by the ſtatute, and certainly a perſonal thing, and *ancient demeſne* exempts not from it; tenants in *ancient demeſne* may be, and in ſome places are churchwardens and overſeers for the poor; now in ſuch caſes their attendance is neceſſary at the ſeſſions and out of the manor.

SCROGGS *Chief Juſtice.* The firſt reaſon and ground of their privileges was the manuring the king's land, and they were always ſuppoſed to have no other eſtate: in truth anciently they were nothing but the king's ploughmen.

Judgment for the king.

(*b*) Reg. 181.
(*c*) 2 Inſt. 443. See alſo 3 Keb. 230. 1 Freem. 348. 11 Mod. 215. Dougl. 337.
(*d*) 2 Inſt. 443.
(*e*) Fitz. N. B. 166.
(*f*) 13 Edw. 1. c.

Caſe 59.

* Anonymus.

* [77]

A covenant to pay rent at *Chriſtmas* and *Midſummer*, or within fourteen days after, is not broken by non-payment on *Chriſtmas Day*.——Ante 73.

COVENANT for payment of rent which was reſerved, payable at the two moſt uſual feaſts of the year, *St. John the Baptiſt* and *Chriſtmas*, or within fourteen days after; the firſt payment

to

to be at *Chriſtmas* next after the date. The breach was aſſigned in non-payment of the rent at *Chriſtmas* firſt, and took no notice of the fourteenth day after. ANONYMUS.

Upon demurrer it was urged, that the fourteen days after ſhould not refer to the firſt payment at *Chriſtmas*, but that it was to be abſolutely on *Chriſtmas Day*.

But it was held BY THE COURT, that the defendant had fourteen days after the firſt *Chriſtmas* as well as any other to pay his rent in.

And therefore judgment was given for the defendant.

Bonfield *againſt* Linton. Caſe 60.

CASE for theſe words, "He is as very a rogue as ever went by "the highway; he killed a man aboard of a ſhip; and if he "had not bought it off with a piece of money, he had ſuffered for "it."

To ſay "He "killed a man "aboard of a "ſhip, and if "he had not "bought it off "for a piece "of money, he "had ſuffered "for it," is actionable; for it ſhall be taken that the *killing* imputed to him was a *felonious killing*, otherwiſe he could not *ſuffer* for it.

It was moved in arreſt of judgment, that the words were not actionable, and there was cited the caſe of *Parram v. Roe.* (*a*)

THOMSON *e contra.* That of ſuffering ſhall make it be intended a felonious killing.

SCROGGS *Chief Juſtice.* Theſe caſes have often varied, and few of them but have received croſs reſolutions; that of *Rolle* is long ſince, even in the ſixth or ſeventh year of *James the Firſt.* We muſt here, after verdict, take it for granted that the words are falſe, and I am ſure they are ſcandalous, and may expoſe a man to a great deal of trouble. Now can we imagine it any other than an unlawful killing, when it is ſaid, that "he would have ſuffered for it?" "He "killed a man" is not actionable, for that may be lawful, and words ſhall be taken *in mitiori ſenſu*: now if I kill a man that aſſaults me on the highway, or breaks my houſe to ſteal, in this caſe I need no pardon; I am not indictable; and if I am indicted I may juſtify, and the jury muſt find me not guilty; * whereas in the caſe of *ſe defendendo*, the jury muſt find the ſpecial matter, and the party forfeits his goods, and he ſtands in need of a pardon though it be of courſe.

4 Co. 17. 20. Jenk. 302. Yelv. 21. 2 Bulſt. 10.

* [78]

And PER CURIAM the words were reſolved actionable, and judgment for the plaintiff. (*b*)

(*a*) 1 Roll. Abr. 72. pl. 8.

(*b*) See the caſe of Peach v. Oldham, where the words "I am thoroughly "convinced that you are guilty, and ra-"ther than you ſhould go without a hang-"man, I will hang you," were, after verdict, held actionable. Cowp. 276.

Hinkes

Caſe 61. Hinkes *againſt* Clarke.

On an iſſue that the freemen and inhabitants of ancient meſſuages have, by cuſtom, a right of common for ſo many beaſts, a verdict finding a right of common *modo et forma*, &c. AND ALSO that the freemen had right of common for twenty more is good; for the latter finding ſhall be rejected as ſurpluſage.

S.C. 2 Lev. 252. 2 Roll Abr. 706. 695. Moor, 431. Cro. Eliz. 480. Hob. 117. Mod. Ca. 4. Cro. Car. 219. 2 Saund. 308. 5 Com. Dig. "Pleader," (f. 28.) Cowp. 47.

WRIT OF ERROR on a judgment in *replevin* in an inferior court. The plaintiff there in his declaration alledges a common, by way of cuſtom, in the freemen and inhabitants of ſeveral ancient meſſuages, &c. The jury find that the freemen and inhabitants of the ancient meſſuages, &c. had common for ſo many beaſts *modo et forma* as in the iſſue, *et ulterius dicunt* that the freemen had common for twenty more, &c.

MR. HOLT *for the plaintiff* in the writ of error inſiſted, that the cuſtom was not found as in the iſſue, but quite another cuſtom; and that the court muſt judge upon the whole; and he cited the caſe of *Foſter v. Jackſon*, *Hob.* 52. and that the laſt matter found is part of the cuſtom.

JONES *Juſtice.* It is another cuſtom and therefore ſurpluſage, for the other cuſtom they have found is, "that the freemen," and does not ſay "inhabitants of the ancient meſſuages."

PEMBERTON *Juſtice.* They have found the iſſue, *modo et forma*, and ſeveral other things which are idle.

An avowry by a burgeſs of a corporation, conſiſting of twelve capital burgeſſes called *freemen*, and twelve inferior burgeſſes called *ſtallingers*, that every freeman inhabiting a houſe there hath by *cuſtom* a right of *common* in the place WHERE, is good; for the cuſtom is not alledged in the *inhabitants* but in the *freemen* of the borough.

THEN another thing which they inſiſted upon was, that it ought to have been a *preſcription* and not by *cuſtom*.

SCROGGS *Chief Juſtice.* In the caſe of *Staples v. Mellar*, (*a*) they inſiſted it might be good by way of *cuſtom* but not by *preſcription*. (*b*) It is the ſame caſe: we are for maintaining of right, and if you aſk what common it is, I ſay it is an ancient common, and for that you alledge the inheritance of common muſt be in ſome body, and therefore cannot be in freemen inhabitants, I would fain know where is the inheritance of a copyhold common? You ſay that that is cuſtomary; ſo is this: there are many commons * by cuſtom that the inheritance of them is in nobody; and yet the lands are charged with them; in the north country are many ſuch; and poor men would loſe their right of common if ſuch pretences ſhould be material objections: what we reſolved in the caſe of *Staples v. Mellar*, will ſettle this; the cuſtom is good, and the verdict has found it well enough.

S. C. 2 Lev. 252.

Judgment affirmed.

Ante, 43. 2 Lev. 246. 6 Co. 60. 2 Leon. 44. Cro. Jac. 446. 2 Jones, 115. 1 Saund. 341. Lev. 196. 1 Vent. 163. 383. 355. 4 Term Rep. 719.

(*a*) Ante, 43.
(*b*) See Melcher v. Spaleman, 1 Saund. 339. 343. Grimſtead v. Marlowe, 4 Term Rep. 719.

Cockram *againſt* Welbye. Caſe 62.

DEBT againſt the defendant, having been ſheriff of the county of and levied money on a *fieri facias* ſued by the plaintiff, on a judgment he had obtained againſt J. S. The defendant pleads the ſtatute of limitations. The plaintiff demurs.

Debt lies againſt a ſheriff before the return of the writ for money levied on a *fieri facias*.

The queſtion was, if debt lies againſt a ſheriff for money levied on a *fieri facias* before the return of the writ.

S. C. 2 Mod. 212. S. C. 1 Freem. 256. Poſt, 166. 172. 281. Moor, 468. 9 Co. 50. Savil. 40.

AND HELD that it does, elſe an inconvenience would follow, that the ſheriff ſhould take advantage of his own wrong, *viz.* not returning the writ. (*a*)

And then, whether this action is within the ſtatute of limitations? AND HELD not, for though it be not a matter of record till the writ be returned, yet it is founded upon a record, and has a ſtrong relation to it.

The ſtatute of limitations cannot be pleaded to debt againſt a ſheriff for money levied on a *fieri facias*.——S. C. 1 Mod. 245. Cro. Car. 297. 2 Mod. 212. 5 Mod. 308. 8 Mod. 171. 2 Ld. Ray. 935. 1204. 1 Peer Wms. 742. 2 Bac. Abr. 356.

(*a*) See Perkinſon v. Gilford, and others, Cro. Car. 539. Speke v. Richards, poſt, 281.

Harwood *againſt* Wheeler and his Bail. Caſe 63.

JUDGMENT is had againſt the principal, and after the return of the *capias ad ſatisfaciendum*, they ſue out a *latitat* againſt the bail; (*a*) and after the return of the *latitat*, and before the delivery of the declaration, the bail render the body of the principal to priſon; notwithſtanding which the plaintiff proceeds, on motion, in behalf of the bail.

A *latitat* may be ſued out againſt the bail, after the return of *non eſt inventus* on the *ca. ſa.* againſt the principal, but if the bail ſurrender the principal before declaration delivered on the *latitat*, the court will ſtay the proceedings againſt the bail. 1 Ld. Ray. 156. Barnes, 106.

THE COURT. Though this practice in ſtrict rigour of the law be good, (*b*) yet it is not fair, (*c*) for the uſual courſe is by *ſcire facias*, and till return of the ſecond *ſcire facias* (*d*) or on the firſt a *ſcire feci* (*e*) the principal may be rendered in diſcharge of the bail; (*f*) and we always ſtay proceedings *thereupon. (*g*) Now bail are to be favoured, and if the plaintiff has the body of the debtor, what can he deſire more? In this *latitat* there is no *ac etiam*; no mention made of anything that would ſignify to the bail that it concerned this debt; and how can they render the body before the

(*a*) Cro. Jac. 165. Stra. 717. 2 Wilſ. 67. 1 Ld. Ray. 156. 721.
(*b*) Cro. Eliz. 738.
(*c*) 1 Ld. Raym. 157.
(*d*) Cro. Eliz 738.
(*e*) Cro. Eliz. 618.
(*f*) Cro. Jac. 109. Moor, 850. S. C. 3 Bulſt. 182. W. Jones, 139. Stiles, 324. 8 Mod. 32.
(*g*) See Wilmore v. Clerk, 1 Ld. Ray. 156. Hanſley v. Page, Barnes, 75. 1 Wilſ. 269. Maſon v. Bruce, Barnes, 66. See alſo Burr. 1360.

latitat

HARWOOD v. WHEELER.

latitat be returned, when perhaps they had notice of it but the night before. (*b*)

The *attorney* and the *counſel* both were checked for this ſnapping practice; the counſel anſwered, that he knew not the opinion of the court, but he had many precedents for it.

SCROGGS *Chief Juſtice.* Since you have gone ſo rigorouſly to work we will uſe the rigour of the law againſt you, as we may do by *imparlances*; we grant therefore an *imparlance* till next term, and then move again for the bail.

(*b*) See 1 Salk. 101. 1 Ld. Ray. 721. 6 Mod. 132. 2 Stra. 915. Tidd's Practice, 146.

Caſe 64. The King *againſt* Hide.

A nolle proſequi ſhall be granted on an *information* after two aſſizes and two notices of trial.

HELD by *the Court*, that after two aſſizes and two notices of trial in *an information*, and no proceeding, that upon the defendant's motion there ſhall be a *non proſ.*; as was done in this caſe.

5 Mod. 394. 6 Mod. 261.

The Thirty-firſt of Charles the Second,

IN

THE KING's BENCH.

Sir WILLIAM SCROGGS, *Knt. Chief Juſtice.*

Sir THOMAS JONES, *Knt.*
Sir WILLIAM DOLBEN, *Knt.*
Sir FRANCIS PEMBERTON, *Knt.* } *Juſtices.*

Sir CRESWELL LEVINZ, *Knt. Attorney General.*

Sir FRANCIS WINNINGTON, *Knt. Solicitor General.*

Pepyn *againſt* Buſtine. Caſe 65.

CASE for ſtopping a gutter through which water deſcended to, &c. Declaration, That he was *poſſeſſed* of a houſe and a yard, and that he and all, &c.

In an action on the caſe for ſtopping a gutter, a declaration in a *que eſtate* to the houſe to which the ſtoppage was a *nuiſance*, without alledging for a *ſeiſin in fee*, is bad. Poſt, 195. 6 Mod. 245. 3 I, 314. 1 Salk. 21 360. Raym. 389.

MR. POLLEXFEN excepted hereto, becauſe he lays himſelf but in *poſſeſſion* of the houſe and yard, and does not alledge a *ſeiſin* in fee, (as he ought to do) in the party in whom he *preſcribes*; but he granted it would have been good if he had laid *a poſſeſſion* of the gutter, (*a*) but this he does not neither, ſo that it comes within neither of the rules.

Judgment ſtayed *quouſque moveatur ex altera parte.*

1 Show. 64. Co. Lit. 17. 121. 2 Mod. 71. 1 Mod. 132. 231. Cro. Jac. 673. Hard. 459. Stra. 5. 3 Term. Rep. 147. 4 Term Rep. 719.

(*a*) See Grimſtead v. Marlowe, that when a plaintiff in poſſeſſion brings an action on the caſe againſt a *wrong doer*, it is ſufficient to declare generally without diſcloſing any title, 4 Term Rep. 718.

Caſe 66. Baſtard *againſt* Baſtard.

A common carrier is liable for the loſs of goods delivered to him to carry, although no particular ſum is agreed on as the price of carriage.

CASE againſt the defendant as a *common carrier*, for a box delivered to him to be carried to *B.* and loſt by negligence.

WILLIAMS moved in arreſt of judgment, becauſe there was no particular ſum mentioned to be paid or promiſed for hire, but only *pro mercede rationabili.*

RESOLVED well enough; and judgment given for the plaintiff; for perhaps there was no particular agreement, and then the carrier might have a *quantum meruit* for his * hire (*a*); and he is therefore as chargeable for the loſs of the goods in the one caſe as the other. (*b*)

Poſt 127. 1 Sid. 36. 1 Vent. 238. 2 Mod. 270. 1 Salk. 26. Cro. Jac. 263. 330. Hob. 17. Molloy 212. 4 Term Rep. 581.

* [82]

(*a*) 1 Mod. 129.

(*b*) See Rogers v. Head, Cro. Jac. 262. and Nichols v. Moor, 1 Sid. 36. in point. Morſe v. Sluys, 1 Vent. 190. 233. S. C. 1 Mod. 85. 2 Ld. Raym. 918. Stra. 128. But this warranty being in reſpect of the reward which the carrier receives, it ought to be in proportion to his riſque, and therefore if a parcel containing *money*, &c. be delivered to a carrier, and only the common rate of carriage paid, when it is uſual for ſuch articles to be paid at a higher rate, the carrier is not liable if the parcel be loſt. Gibbon v. Paynton, 4 Burr. 2298. for he ought to be apprized of what he undertakes to carry. 4 Burr. 2301. Carth. 485. See alſo Molloy de Jure Mar. 209. 1 Bac. Abr. 334. 1 Salk. 26. 1 Com. Dig. 8vo. edit. 302. Golden v. Manning, 3 Wilſ. 429. and Troward v. Pittard, 1 Term Rep. 33. Garſide v. Proprietors of Trent Navigation, 4 Term Rep. 581.

Caſe 67. Malett *againſt* Stukely.

An amendment may be made in the record after error allowed.

MOTION was made, after a writ of error, to amend a miſtake in the return day, as *proxime poſt*, when it ſhould have been *in craſtinum*; and alſo the omiſſion of *vicecomiti*; and the award of the writ of enquiry was *ideo præceptum eſt.*—GRANTED.

Poph. 102. Latch. 162. Jones 9. 3 Lev. 361. Stra. 11. 787. 1227. Dougl. 114. 1 Term Rep. 783. Ld. Ray. 95. Cowp. 407.

Defendant ſhall not take advantage of his own wrong on a writ of error.

And ordered that the defendant in the action do file bail, for that is his work, and he ſhall not take advantage of his own wrong upon a writ of error.

Caſe 68. ——— *againſt* Sterne.

An *indebitatus aſſumpſit* lies for money won at play; provided it be not at a game within 16 Car. 2. c. 7. or 9 Ann. c. 14.

ASSUMPSIT upon an *indebitatus* and *inſimul computaſſet*, and verdict.

Poſt 185. 1 Vent. 174. N. Lut. 59. 5 Mod. 14. 3 Lev. 118. 6 Mod. 128. 2 Vent. 175. 1 Salk. 23. 3 Salk. 14. 175. 2 Ld. Raym. 1030. 2 Burr. 1005. Cowp. 790.

Exception

Exception was taken in arreſt of judgment, becauſe the account is for money won at play *et alias denarior' ſummas.*

v.
Stean

ADJUDGED that it lay; for debt lies at common law for money got at play, and now, provided it be under a hundred pounds at one ſitting, by the ſtatute of 16 *Car.* 2. *c.* 713 (*a*); and an account lies not for rent becauſe certain, but for rent with other matters it will lie; *indebitatus aſſumpſit* lies for a wager, and at play there are *mutual aſſumpſits* (*b*), and being ſo alledged it will lie.

(*a*) See 9 Ann. c. 14. ſ. 2, and 18 Geo. 2. c. 34. ſ. 3. 2 Bl. Rep. 1226. 2 Stra. 1249. 2 Burr. 1077. 1082. and Mr. Fonblanque's Treatiſe of Equity, 223. notis.

(*b*) See 2 Bl. Rep. 706. Ld. Raym. 1035.

Stone *againſt* Exton. Caſe 69.

WRIT OF ERROR on a judgment in ejectment in the Common Pleas. A copyholder in poſſeſſion by a wrongful title, the right being in a *feme covert*, who with her huſband comes into court, and being ſecretly examined before the ſteward (*a*) releaſes in court by ſurrender to the tenant in poſſeſſion: the huſband dies.

The ſurrender in court of a copyhold by huſband and wife, to a tenant in poſſeſſion by a wrongful title, ſhe being examined by the ſteward, binds the wife, although there is no cuſtom to ſupport it.

Poſt 153.
4 Co. 22.
Cro. Jac. 36, 536.
Yelv. 145.
2 Mod. 287.
4 Leon. 88.
2 Inſt. 673.
Mod. 323.
Liz. Rep. 274.
2 Wilſ. 1.

The queſtion was, If this ſurrender is good and binding?

It was urged that this cannot be; the jury cannot find impoſſibilities, as that ſhe ſhould releaſe by ſurrender to the tenant who cannot take a ſurrender, and * that it is void after the death of the huſband; and cited 10 *Co.* 43. 10 *Edw.* 4. *pl.* 13. *Kite v. Queinton.* 4 *Co.* 25. *pl.* 11.

But PER CURIAM. There the queſtion was, Whether it could be releaſed by deed? But never any doubt but that it might be ſurrendered in court; and there is no need of a particular cuſtom for it: here the releaſe is to the tenant in poſſeſſion, and there needs no new grant or admittance of the lord; and if the right tenant had been admitted, the other had been out: as for the jury's finding it, it is a ſurrender in court to the tenant's uſe; the releaſe is good.

* [83]

And judgment was affirmed. (*b*)

(*a*) Cro. Eliz. 717. 1 H. Bl. Rep. 345.

(*b*) See the caſes Taylor v. Phillips, 3 Vezey 229. Wiſe v. Tyrell, 2 Wilſ. 1. Complin v. Collinſon, 6 H. Bl. Rep. 334 to 351. S. C. 2 Brown's Caſes Chan. 377 to 388.

Caſe 70. Midwinter *againſt* Partridge.

A deviſe of "all "my houſes in "L. to my "wife, for and "towards the "maintenance "of my daugh-"ter's child, "and if ſhe re-"fuſe to main-"tain him, my "will is, that "my executors "ſhall enter" conveys an eſtate *in fee* to the wife, ſubject to the *charge* of maintaining the child.

Ante 36.
2 Jones 107.
1 Roll Abr. 834.
Pollexf. 545.
Moor 57.
Cro. Eliz. 378.
2 Lev. 104.
1 Mod. 189.
Carter 232.
6 Mod. 106.
3 Chan. Rep. 102.
1 Salk. 240.
Foſt. 58.
Stra. 798.
2 Atk. 71.
1 Brow. Ch. Rep. 489.
Cowp. 43.

* [84]

EJECTMENT, ſpecial verdict. The caſe was on the words of a will, "I give and bequeath all my houſes in *L.* to my "wife, for and towards the maintenance of my daughter's child; "and if ſhe refuſe to maintain him, my will is, that my executors "ſhall enter, &c."

The queſtion was, If the wife had a fee?

MOLLOY. This is a fee according to *Collier's caſe* (*a*), becauſe elſe it would be a prejudice to her, and ſhe is bound to maintain him immediately before ſhe receives any of the profits; "for and "towards" are the ſame with "maintaining," and "maintaining" the ſame with "allowing and paying;" for if I bequeath ſuch a ſum toward the paying, it is the ſame with giving ſo much; and he cited the caſe of *Lee v. Stephens.* (*b*)

MR. ATTORNEY *è contra.* "For and towards" is but a truſt to maintain the child; and this annually, and not a ſum *in groſs*; "for and towards," that is ſo far as the profits will reach; and he cited the caſe in *Dyer*, 371. *b.* where was a remainder to *B.* and he deviſed the land which he had or might have in reverſion or remainder to his wife, rendering forty ſhillings *per annum* during her life to, &c. and held, that ſhe ſhould have no eſtate but for life to commence when the remainder fell, and then the payment ſhould begin; ſo the maintenance is to be as the profits do ariſe: he argued that this eſtate is and always will be chargeable * with this truſt, and the heir, if it come to his hands, will be chargeable therewith; he cited the caſe of *Wellock v. Hammond*, cited 3 *Co.* 20. *b.* and the ſame caſe is better reported in *Cro. Eliz.* 204. and the caſe of *Anneſley v. Chapman*, *Cro. Car.* 157.

SCROGGS *Chief Juſtice.* I confeſs that maintaining the child muſt neceſſarily be before any profits can be received, but "for and to-"wards" ſeems not ſo ſtrong, but only that the maintenance ſhall be out of the profits.

JONES *Juſtice.* A fee paſſes becauſe it is a preſent charge.

DOLBEN *Juſtice.* The heir at law is always to be favoured, unleſs there be expreſs words that give away the eſtate, and the teſtator's good-will ſeems to be only for the maintenance of the child, and no deſign to the wife; perhaps there is ſomewhat elſe for its maintenance beſides, for this is only towards her maintenance.

PEMBERTON *Juſtice.* I think it *a fee*, the deſign being that the child ſhould have a maintenance during his life, and if the wife have

(*a*) 6 Co. 16. (*b*) Ante 49. and S. C. under the name of Lee v. Withers, 2 Jones 107.

but an eſtate but for her *life*, and ſhould die, the child would want a maintenance. MIDWINTER v. PARTRIDGE.

Adjornatur.

The King *againſt* * * * * Caſe 71.

INDICTMENT for a reſcous committed by the defendant, wife of *J. S.* and others.

Qu. If "wife "of J. S. of "ſuch a pariſh," be a ſufficient deſcription of the defendant in an indictment of reſcous. 1 Hen. 4. pl. 5. 4 Hen. 6. pl. 4. Dyer 47. Cro. Eliz. 198. 2 Hawk. P. C. ch. 23. ſ. 111.

The exception was, That there was no *addition* but only "wife "of *J. S.*" of ſuch a pariſh, without giving him any addition.

TREMAINE urged *è contra*, 2 *Inſt.* 665. Reſcous according to my *Lord Coke* is not within the ſtatute of additions, and therefore *uxor* of ſuch a one is ſufficient. *Adjornatur.*

NOTE, *J. S.* ſervant to *J. N.* eſquire, or *A. B.* wife of *T. B.* gentleman, are ſufficient additions. 9 *Edw.* 4. *pl.* 8. 3 *Hen.* 6. *pl.* 31. 6 *Mod.* 58.

Killigrew's Caſe.

RESOLVED in the Houſe of Lords the laſt parliament, in the caſe of *Mr. Killigrew*, that the king's ſervants, as well as noblemen's ſervants (*a*), are privileged in time of parliament from arreſts. *Ut dixit* DOMINUS SCROGGS,

The king's ſervants, as well as the ſervants of peers, are privileged from arreſt.

(*a*) Dewes 43. 66. Dyer 60. 4 Inſt. 24. Ruſhworth 119. and ſee Wickham v. Hobart, Strange, 1065. Cheſter v. Upſdale, 1 Wilſ. 278. Rex v. Wilkes, 2 Wilſ. 151. and the reſolution of the Houſe of Lords, 28 June, 1715.

* Memorandum. * [85]

In this *Michaelmas* Term was SIR CRESWELL LEVINZ made Attorney General, SIR WILLIAM JONES having laid down his place the latter end of *Trinity* vacation.

LEVINZ made *Attorney General.*

Hilary Term,

The Thirty-firſt and Thirty-ſecond of Charles the Second,

IN

THE KING's BENCH.

Sir WILLIAM SCROGGS, *Knt. Chief Juſtice.*

Sir WILLIAM DOLBEN, *Knt.*
Sir THOMAS JONES, *Knt.*
Sir FRANCIS PEMBERTON, *Knt.*
} *Juſtices.*

Sir CRESWELL LEVINZ, *Knt. Attorney General.*

Sir FRANCIS WINNINGTON, *Knt. Solicitor General.*

Anonymous.

Caſe 72.

Writ of error on a judgment againſt principal is no *ſuperſedeas* of proceedings againſt the bail; but a ſubſequent *capias* againſt principal is irregular.——1 Roll. Abr. 742. Poſt 98.

UPON motion, agreed PER CURIAM, That *a writ of error* on the judgment againſt the principal is not a *ſuperſedeas* to the proceedings againſt the bail, though when the firſt judgment is reverſed, the other fails; but yet if a *capias* be awarded againſt ſuch principal after the writ of error be brought, it is irregular, and ſhall be ſet aſide *quia improvide emanavit.* PER TOUT LE COURT. (*a*)

(*a*) See Pool v. Charnock, that the Court will in general ſtay the proceedings againſt the bail pending a writ of error on the judgment againſt the principal, unleſs the principal has *confeſſed* that the writ of error is brought purely for delay, 3 Term Rep. 79. But ſee Chriſtie v. Richardſon, 3 Term Rep. 79. Carter v. Roberts, 2 Term Rep. 78. Rock v. Cooling, ante 55. notis. And if a *capias* is returnable againſt the principal on a particular day before which a writ of error is allowed and ſerved, it operates as a *ſuperſedeas* to any proceedings againſt the bail, although the *capias* has lain four days in the office, before the allowance of the writ of error, Perry v. Campbell, 3 Term Rep. 390.

Caſe 73. The King *againſt* Deane, Bird, and others.

The vendee of *a term* under a *venditioni exponas*, muſt bring an ejectment to obtain poſſeſſion, for it cannot be delivered to him by the ſheriff. S. C. Poſt 87, 88. 3 Keb. 243.

UPON motion for reſtitution to a poſſeſſion, which the party had been put out of by colour of a *fieri facias*, it was held by THE COURT, that if a ſheriff on a *fieri facias* ſell a leaſe or term of an houſe, he cannot and muſt not put the perſon out of poſſeſſion, * and the vendee in; but the vendee muſt bring his ejectment. PER CURIAM. (*a*)

* [86]

(*a*) See the caſe of Taylor v. Cole, 3 Term Rep. 292.

Caſe 74. Anonymous.

All the mariners of a ſhip may ſue the maſter jointly for their wages. Ray. 3. 1 Vent. 146. 343. 3 Lev. 60. 1 Salk. 31. 9 Mod. 379. 1 Ld. Ray. 577. 2 Ld. Ray 1044. 1247. and ſee Mr. Kyd's edition of Com. Dig. 1 vol. 390.

UPON motion it was held, that if all the mariners of a ſhip join to ſue the maſter in the admiralty court, they may do it, and no prohibition lies; but if the maſter and ſeamen join in a ſuit againſt the owners for wages (*a*), there a prohibition may iſſue on motion.

(*a*) 2 Ld. Ray. 984.

Caſe 75. Hodder *againſt* Saunders.

On executing a *writ of enquiry* for goods ſold and delivered, the plaintiff muſt prove the *quantity* and *value*. Poſt 200.

ASSUMPSIT for one hundred and forty-four pounds, part for wares ſold; and judgment by default; writ of enquiry awarded and executed at *Topſham*, in preſence of SHAPCOTT and TREMAINE counſel.

SHAPCOTT would not prove any thing of the ſale and delivery, or the *quantum* that was ſold, but ſaid, The defendant had confeſſed it, or at leaſt it lay on them to diſprove it, and ſo the jury gave the whole full damages to one hundred and forty-four pounds.

Now upon affidavit thereof the writ of enquiry was ſet aſide on that account, that the plaintiff ought to prove the *quantum* and value. *Ex motione* MEA. *Vide Yelv.* 151, 152. *Goodwin v. Overet.*

Pawlett

Pawlett *againſt* Savage. Caſe 76.

DEBT on a bond. After *oyer* craved of the condition, it appeared to be for performance of covenants in a certain indenture made between the plaintiff and the defendant.

In debt on bond for performance of covenants, the defendant cannot plead performance generally. Co. Lit. 303. Moor 856. Hob. 13.

The defendant pleads *quod performavit omnia et ſingula ex ejus parte, &c.* and mentions none in particular.

AND HELD naught, for he ought to ſet them forth.

Cro. Eliz. 691. Dyer 373. Palmer 70. 1 Leon. 311. 1 Show. 1. Cro. Jac. 560. Savil 120. 1 Lev. 303. 1 Salk. 498. 5 Com. Dig. "Pleader" (E. 25.) (E. 26.) (2 V. 13.) (2 W. 33.) Cowp. 56.

* The King *againſt* Bird. Caſe 77.

* [87]

RESOLVED by the Court on motion, That on a *fieri facias* the ſheriff may ſell the goods, and if he pay the money to the party it is good, and the Court will allow of ſuch return, becauſe the plaintiff is thereby ſatisfied, although the writ run, *ita quod habeat coram nobis, &c.* or elſe he may return that he has them in his hands for want of buyers, and then a *venditioni exponas* goes, commanding him to ſell them at the beſt rate he can; and he muſt not appraiſe them too high, for if he value them ſo high that none will take them at that rate, he muſt himſelf; yet if before ſale the defendant, or any other perſon for him, do tender him the money, &c. he cannot ſell them.

The ſheriff cannot ſell goods levied under a *fieri facias*, if the debt and coſts are tendered to him; and if on the *venditioni exponas*, he values them too high, he ſhall take them himſelf; but he may return that he has paid the money to the plaintiff, or that the goods remain in his hands.——S. C. Ante 85. Yelv. 44. 1 Sid. 438. 2 Saund. 47. Impey's Sh. 155. Cowp. 406.

MR. WILLIAMS remembered the caſe of *Hardy* the ſheriff of *Cheſter*, who was laid by the heels here for keeping goods in his cuſtody, and not ſelling them when he had opportunity.

AGREED likewiſe *per Curiam*, that on a *fieri facias* when the officers are once in the houſe, they may break open any chamber doors (*a*), or trunks (*b*) for doing their execution: (*c*) and upon a *capias utlagatum*, though on *meſne proceſs*, and at the ſuit of the ſubject, yet upon that writ they may break open any outward doors after demand and refuſal.

Outward doors may be broken open to execute a *capias utlagatum*, and inner doors to execute a *fieri facias*. 5 Co. 92.

1 Hale 459. 2 Hall 217. 6 Mod. 173. Palm. 54. 1 Salk. 79. Forteſ. 320. 2 Bac. Abr. 363. Impey's Sher. 147.

(*a*) 5 Co. 92, 93. Hob. 62. 263.
(*b*) See the Year Book, 18 Edw. 4. fol. 4. pl. 19.
(*c*) See the caſe of Lee v. Ganſell, Cowp. 1 to 9. accord.

The

Caſe 78. The King *againſt* Dean and Pepys.

Perſons committed by *rule* of the Court of King's Bench, are not entitled to be diſcharged under *habeas corpus act*.

RESOLVED by the Court, That a man committed by this Court is not within the benefit of the late *habeas corpus act*; and that that act reaches only to extrajudicial commitments by king and council, or ſecretaries of ſtate, and the like. And accordingly the defendants were denied the benefit of it. (*a*)

31 Car. 2. c. 2. Stra. 142. 308. Fort. 101. 103. 2 Burr. 765.

(*a*) See an anonymous caſe, 10 Mod. 429, accord. and 1 Salk. 349.

Caſe 79. * The King *againſt* Dean and others.

*[88]

A priſoner in cuſtody on *a contempt*, cannot be charged with a *civil action*, without leave of the Court.

THE DEFENDANT being committed by the Court for *a contempt*, cannot be charged with an action without leave of the Court, but upon motion they generally give leave, as they did in this caſe to *Pinkney*, a creditor of *Dean's*.

——Ray. 58. 1 Sid. 90. 154. 1 Lev. 124. 146. 1 Salk. 354. Barnes 380. 2 Bl. Rep. 970. 1 Bl. Rep. 30. 1 Wilſ. 217. Foſter 51. Tidd's Practice 194.

A perſon committed by the Court of King's Bench for a *contempt* cannot have a *day rule*.

THE CHIEF JUSTICE declared, That no priſoner committed by this Court, ought to have the benefit of the *day rule* of going abroad in term time; for the impriſonment is their puniſhment for the contempt or miſbehaviour.

Caſe 80. Calcot *againſt* Hatton.

A ſpecial promiſe to pay the debt of another, is within the ſtatute of frauds, though the action is brought in an inferior court.

ERROR to reverſe a judgment in caſe of *aſſumpſit* in the ſheriff's court of the city of *York*.

RESOLVED, That an *indebitatus aſſumpſit*, or a *ſpecial aſſumpſit*, though it be on a ſpecial promiſe to pay another man's debt, and though it be *collateral*, is within the ſtatute 29 *Car.* 2. *c.* 3. of frauds and perjuries.

2 Term Rep. 80. Cowp. 227.

The omiſſion to alledge a note in writing in an action on a collateral promiſe, is aided by a verdict.

Yet the not alledging a note in writing in the declaration is not error, for THE COURT will intend there was a note given in evidence; yet many, ſince that act, do declare *quod aſſumpſit ſuper ſe prout per notam*, &c. but this is not neceſſary; for the want of it is not error.

2 Jones 158. Dan. 68. Ray. 451. Salk. 519.

Judgment was affirmed.

Anger *againſt* Brookhen. Caſe 81.

ERROR on a judgment in the Court of King's Bench in *Ireland*, which was by default, and writ of enquiry; and the jury aſſeſs one hundred pounds, and ſixpence coſts; and judgment is *quod prædict' querens recuperet damna ſua prædict' ad cent' libras per inquiſition' prædict' compert' et pro increment'* ſeven pounds, &c.

On a verdict for one hundred pounds *damages*, and ſixpence *coſts*, a judgment entered *quod recuperet damna ſua ad centum libras, et pro incremento* ten pounds, without taking notice of the ſixpence coſts, is bad. *Sed qu.*

AGREED, That if *ad cent'* had been left out, it had been doubtleſs good; and therefore it was argued, that the reſt ſhould be *jurpluſage*, or elſe miſcounting, which will not vitiate the judgment.

* SCROGGS *Chief Juſtice.* It cannot be a *miſcounting* becauſe no notice is taken of the coſts aſſeſſed by the jury.

DOLBEN *Juſtice.* If it had been five pounds more than the whole came to, we ſhould have reckoned it a miſcounting; for *damna* would have included both coſts and damages. (*a*)

S. C. Ante 56. S. C. 1 Vent. 348. 350. S. C. 2 Jones 128.

SAUNDERS urged the caſe of *Daux v. Fellowes*, in this court (*b*), to be reverſed for this very reaſon, and the reverſal entered; and the caſe of *Oſbourn v. Exton* (*c*), reverſed for this very reaſon.

S. C. Ray. 387. S. C. 2 Danv. 456.

* [89]

SCROGGS *Chief Juſtice.* If it had been *attingent'* it would be a mis-summing.

PEMBERTON *Juſtice.* It is *damna ſua prædict'*, which includes all: there was urged the caſe of *Motlock v. Cowle* (*d*); and that "*attingent*" is all one with "*ad*" and "*ad*" with "*attingent*," and that whether the "*ad*" do hit the ſum right or no it is but miſcounting, for if more or leſs it were good.

SCROGGS *Chief Juſtice.* The jury here gave particulars, and the judgment is but for one of thoſe particular ſums.

JONES *Juſtice.* "*Damna prædict.*" is enough, and all the reſt naught and ſurpluſage: *ad* is as much as *attingent'*, for its meaning elſe is no ſenſe; it will be hard to make the word *ad* reſtringent when the Court ought to give judgment for the whole: *ad* is the uſual word in all judgments, and reaches the whole, and it was the intent of the Court to give all: where they intend but part, they ſay *quoad*. In the Common Pleas they ſay *damna ſua prædict' ad* then comes the *increment'*, and after that the *quæ quidem*, &c.

POLLEXFEN. They give an *increment'* for coſts; which cannot be if the Court did not intend coſts ſhould be given before. If they had intended to omit it, they would have ſaid *nullo reſpectu habito de* ſixpence.

(*a*) 1 Roll. Abr. 578.
(*b*) Eaſter Term, 22 Car. 2. Roll. 299.
(*c*) Ante 44.
(*d*) See ſame caſe under the name of Porecock v. Hoole, 3 Danv. Abr. 58. p. 38. S. C. 1 Roll. Abr. 773. pl. 34.

However,

ANGER v. BROOKHEN.

However, upon the two caſes which MR. SAUNDERS cited the rule was *quod reverſetur jud' niſi, &c.* (*e*)

Tamen quære; for "*damna*" being a general word for the coſts and damages, it ſeems to be a complete judgment in that *quod recuperet damna ſua prædict'*, and the reſt coming after is ſurpluſage; for if they had ſaid no more than this, *quod recuperet damna ſua prædict' et de increment', &c. ad requiſition,' &c.* it would doubtleſs have been well enough.

(*e*) Sed vide ante, S. C. 56. notis.

Caſe 82.

* [90]

A covenant to pay money at a future day is not diſcharged by *a releaſe* of "all debts, "dues, actions, "cauſes of "actions, obli- "gations, and "writings obli- "gatory," made before the day of payment.

Co. Lit. 292. 1 Lev. 99. 101. 272. 2 Lev. 206. 210. 214. 3 Lev. 273. 1 Mod. 99. 1 Sid. 141. Cro. Eliz. 897. 1 Sal. 171. 575.

* Carthage *againſt* Manby.

COVENANT for payment of money at a future day: the defendant pleads *a releaſe* made before that day, "of all debts, "dues, actions and cauſes of actions, bills, obligations, writings "obligatory, &c." Demurrer thereto.

MR. POLLEXFEN *for the plaintiff.* A releaſe of all demands is no releaſe of the covenant before it is broken; and he cited the caſe of *Hen v. Hanſon*, in this court where it was (*a*) adjudged that a releaſe of all demands is no releaſe of rent; and LORD HALE declared the caſe to be good law. (*b*)

THOMPSON *è contra.* "Demand" is a general word, and the largeſt word that can be uſed in a releaſe; and he cited *Littleton's text* (*c*) for it, and the caſe of *Witton v. Byd*, (*d*) and no doubt if the "word covenant" were mentioned, it would releaſe it though not broken. (*e*) Beſides, an action of *debt* as well as *covenant* will lie on a covenant to pay money; therefore "writings obligatory" will not reach it, for a covenant in writing is a writing obligatory; and by "writings obligatory" cannot be meant bonds, for that is included in the word "obligation."

Adjornatur.

IT WAS ADJUDGED in Trinity Term, That the releaſe of "all "writings obligatory" did not releaſe covenants not broken, for that is releaſeable only by ſpecial name; and although a covenant be a writing obligatory, yet it has a particular ſignification, as when we declare *per ſcript. obligatorium*, it means no more than a bond, and "demands" will not reach it, for that will not releaſe a rent before it is due, as was in this Court formerly adjudged in LORD HALE's time. Judgment for the plaintiff.

(*a*) 1 Keb. 499. 510. 1 Sid. 141. 1 Lev. 99. Cro. Eliz. 268.
(*b*) Auſtin v. Lippencourt, 1 Mod. 99.
(*c*) Lit. ſect. 508.
(*d*) Cro. Jac. 587. See alſo Cro. Jac. 300. 487. Cro. Eliz. 606.
(*e*) Co. Lit. 292. See 2 Lev. 206.

* Harris *againſt* Belchey.

Caſe 83.

EJECTMENT. A ſpecial verdict finds a feoffment in fee to the uſe of *Paul Barret* and his daughter *Sarah* for their lives, and after their deceaſe, to the firſt, ſecond, third, &c. ſons of *Sarah* in tail, *ſucceſſivè*; remainder over to the heirs of *Paul* in fee: before any iſſue had by *Sarah*, ſhe releaſes all her, &c. to *Paul Barret* and his heirs. She afterwards took huſband, and had iſſue a ſon, the leſſor of the plaintiff.

The queſtion was, whether this releaſe before the birth of a ſon ſhould deſtroy the contingent remainder limited to the firſt ſon.

Mr. Holt argued, That it does not, from the caſe of *Lewis Bowles*, (*a*), the ſame caſe in 1 *Roll. Rep.* 177. and the caſe of *Chaddock v. Cowley*. (*b*)

Mr. Pollexfen *è contra*. I agree they are *jointenants*, and that the releaſe ſhall not enure as *a grant*, but only as *a releaſe*. It will be agreed to me, that no contingent remainders can be preſerved without a particular eſtate; and no longer can it continue than the particular eſtate continues. *Lit. ſect.* 283. *Co. Lit.* 182. If the jointenancy be deſtroyed then the fee comes down on *Paul*, and then the contingent remainders are gone. *Lewis Bowles's caſe* differs from ours, for in that there was an eſtate tail executed, but here is a joint eſtate for life. Further, the law takes a great difference between the caſe where it is by one conveyance and where by ſeveral, for in the former the law preſerves the eſtates diſtinct, otherwiſe if by ſeveral deeds; here they are ſeveral eſtates at firſt in *Paul*; then that which mixes them together is the releaſe, and by that the particular eſtate is deſtroyed, and by conſequence the contingent remainders are deſtroyed likewiſe: all agree that theſe eſtates in *Paul* are but one as to rights and remedies, and as to ſtrangers, but they are ſeveral as to the parties for the benefit of ſurvivorſhip.

Scroggs *Chief Juſtice*. You muſt agree, that if *Sarah* had releaſed to *Paul* without words of inheritance, the contingent remainders would ſtill have been ſupported.

Jones *Juſtice*. A releaſe by one jointenant to another makes but one degree, it makes not degrees.

* Pemberton *Juſtice*. They might maintain *waſte*, which ſhews that the reverſion was executed, and ſo as to a moiety he might have pleaded an inheritance againſt a ſtranger, yet between themſelves it is not ſo.

Jones *Juſtice*. As to a moiety there is no difference between this and *Lewis Bowles's caſe*.

(*a*) 11 Co. 79. 1 Roll Rep. 177. (*b*) Cro. Jac. 695.

Mr.

* [91]

If lands be ſettled to the uſe of A. and B. for their lives, remainder to the uſe of the firſt ſon of B. in tail male, remainder to the heirs of A.

A RELEASE made by B. of all her right and eſtate to A. and his heirs, does not deſtroy the *contingent remainder* to the firſt ſon of B. although the releaſe be made before ſuch ſon is born.

S. C. 2 Jones 136. S. C. 1 Vent. 345. S. C. Ray. 413. S. C. Pollexf. 573. S. C. 1 Freem. 484. Poſt 243. Co. Lit. 251. Dyer 339. 1 Leon. 262. 1 Roll. Abr. 855. 1 And. 45. 1 Mod. 107. 2 Atk. 250.

* [92]

HARRIS v. BELCHER.

MR. SAUNDERS afterwards argued this case, that the contingent remainders are not destroyed; for if she had died this would not have destroyed it, and a release of one jointenant is no more than death and survivor; he cited *Lewis Bowles's case*, 11 *Co.* 79. and *Co. Lit.* 184. and a release of one and death of one is the same to all purposes, excepting the case of charges and incumbrances, where the law for the benefit of a third person, by a fiction, supposes the charge to continue, he agreed, that a discent of the fee would, &c.

It was ADJUDGED by all THE COURT, in *Michaelmas* Term following, (except DOLBEN *Justice*) That the release has the same effect with a death and survivor; and so the contingency not destroyed. (*c*)

(*c*) It is said that judgment was given by SCROGGS *Chief Justice*, and JONES and RAYMOND *Justices*, for *the lessor of the plaintiff*, S. C. Raym. 414. who was the son of *Sarah Berret*, under a coverture posterior to the release, S. C. Pollexfen 574; for that the release only changed the *quality* and not the *substance* of the estate, and therefore the contingent remainder was not destroyed, S. C. 2 Jones 137. and Mr. *Fearne* on the authority of this case, as thus decided, and of the case of *Lane v. Powel*, 1 *Roll. Rep.* 238. agrees that the alteration of the *particular estate* to destroy a *contingent remainder* must amount to an alteration in its *quantity*, and not in its *quality*, Fearne, 4 edit. 497; but in the former edition of these reports, it is said, "BUT NOTE, it was afterwards "adjudged in this case, that the re- "mainder was destroyed," NOTE *to former edition*; and in the report of this case by VENTRIS, it is said, that the Court doubted whether there was such an alteration of the estate, as to destroy the remainder, because as to some purposes, the fee was executed before the release; but that it was adjourned, and afterwards adjudged that the remainder was destroyed, S. C. 1 Vent. 345; and see 4 Leon 237. 8 Co. 76. a. 2 Saund. 386. 1 Lev. 15. Ray. 28. Coulsac v. Coulson, 2 Atk. 250. Smith v. Clifford, 1 Term. Rep. 742.

Case 84. Thomas *against* Gifford.

The suggestion on which a prohibition is granted, if *affirmative*, must be proved within *six months*, as the statute requires.

PROHIBITION. Resolved that by statute of 2 and 3 *Edw.* 6. *c.* 13. *s.* 14. the *suggestion* of barren land newly improved, and therefore exempt from tithes for seven years, ought to be proved within *six months*, otherwise a consultation to go. *Cro. Car.* 208. *State v. Eskins*, 1 *Brownl.* 198. *Lobb v. Hunt*; and all affirmative suggestions ought to be proved, as is implied in 2 *Inst.* 662. (*a*) And for want of this proof *a consultation* was granted in this case accordingly. (*b*)

Godb. 245. Carth. 463. Yelv. 102. 119. Noy 148. Cro. Car. 208. Dyer 170. 1 Roll. Rep. 2. 55.

(*a*) For the cases in which the suggestion need not be proved, see 2 Keb. 134. 2 Leon 89. 213. 3 Leon 257. Yelv. 102. 119.

(*b*) The six months shall be computed according to the *calendar*, Litt. Rep. 19. Hob. 179. 2 Mod. 58. and shall begin to run from the *teste* of the prohibition, 1 Salk. 554. 2 Ld. Ray. 1172. and if the declaration in prohibition be ordered to be amended from the time of the amendment, Barnes 428. and such proof may be made in vacation time, Latch. 30. Lit. 155. but Moor 573. contra; and it may be proved by interested witnesses, 4 Bac. Abr. 246. but not by persons attainted of felony, 2 Bulst. 154. See also Palmer 377. Noy 44. Cro. Eliz. 736.

Holton

Holton *againſt* Croft. Caſe 85.

ERROR on a judgment in an inferior court, in *indebitatus aſſumpſit* for four hundred pounds. The jury find damages to three hundred pounds, and judgment is accordingly *quod recuperet* three hundred pounds, and no *eat ſine die*, as to the reſt: *non allocatur*; * becauſe *in caſe*, otherwiſe if it had been *in debt*.

In an action on the caſe, if a verdict be for four hundred pounds, judgment for three hundred pounds, is good, though no *eat ſine die* for the reſidue.

* [93]

ANOTHER EXCEPTION taken was, That the jury found the *aſſumpſit modo et forma prædict' le placito allegavit et narravit*, and do not ſay *prout*.—AND HELD naught; and judgment reverſed *niſi*, &c.

A verdict finding any aſſumpſit *modo et forma* as alledged, without ſaying *prout*, is erroneous.

Skidmore *againſt* Boucheir. Caſe 86.

ERROR upon a judgment in the Common Pleas: the writ was a treſpaſs for entering into his houſe and ſeveral cloſes; and the declaration was of an entry into his houſe *et in unum clauſum et unum toftum*: HELD NAUGHT, for that *toftum* is not *a cloſe*, but ground whereon a houſe formerly ſtood.

On a writ of treſpaſs for entering *ſeveral cloſes*, a declaration for entering *one cloſe* and *toft* is a fatal variance.——4 Mod. 246. Cowp. 766. Dougl. 666.

The King *againſt* Hemings and others. Caſe 87.

INDICTMENT for a riot and aſſault on *Lady Mohun*: The jury find them *not guilty* of the riot, but guilty of the treſpaſs and aſſault.

MR. SAUNDERS moved in arreſt of judgment, for that it was one entire offence, and the jury could not ſever it.

But over-ruled and allowed good, for ſo it has been often judged: although if a man be indicted of *felony* he cannot be found guilty of *treſpaſs*, becauſe they differ *toto genere*, but *riot* and *aſſault* are as near of kin as *murder* and *manſlaughter*.

On an indictment for a *riot* and an *aſſault*, the defendants may be found guilty of the *aſſault*, and acquitted of the *riot*.

Poſt 149. 262. Yelv. 99. Hard. 166. Cro. Eliz. 854. 3 Mod. 72. Cowp. 325.

The

Caſe 88. The King *againſt* The Mayor of Saltaſh.

A defendant in execution for a fine on a conviction for a riot, admitted to bail on a recognizance to proſecute his writ of error with effect, or to pay his fine.

Ante, 5.

INDICTMENT for a riot, and the defendant being in execution for his fine to the king was bailed, becauſe he had brought his writ of error, he giving ſecurity to proſecute it with effect and get it reverſed, or pay the fine, though THE COURT did all agree he could not be taken in execution again; and here was cited the caſe of *the King v. Legier*, where LORD HALE refuſed to take bail, he being in execution, and having brought his writ of error, unleſs he brought the money into court.

* [94]

* Memorandum.

PEMBERTON removed from the *bench*.

After this term SIR FRANCIS PEMBERTON received his *quietus*, and afterwards practiſed again in all the courts in *Weſtminſter-Hall*, but without the bar, as a ſerjeant.

RAYMOND and CHARLTON promoted.

And in his place ſucceeded SIR THOMAS RAYMOND, and SIR JOB CHARLTON as puiſne judge in the Common Pleas.

JEFFERIES promoted.

And SIR GEORGE JEFFREYS ſucceeded him in the office of chief juſtice of *Cheſter*; retaining ſtill his place of recorder of *London*.

Eaſter Term,

The Thirty-ſecond of Charles the Second,

IN

THE KING's BENCH.

Sir WILLIAM SCROGGS, *Knt. Chief Juſtice.*

Sir THOMAS JONES, *Knt.*
Sir WILLIAM DOLBEN, *Knt.*
Sir THOMAS RAYMOND, *Knt.*
} *Juſtices.*

Sir CRESWELL LEVINZ, *Knt. Attorney General.*

Sir FRANCIS WINNINGTON, *Knt. Solicitor General.*

Ruſhworth *againſt* Wade.

Caſe 89.

Michaelmas Term, 31 *Car.* 2. *Roll* 57.

In what caſe a promiſe or agreement made by a third perſon to a bailiff in conſideration of his diſcharging a priſoner in cuſtody on *meſne proceſs* is good.
S.C. 2 Jones, 139.
Ante, 51.
10 Co. 101.
And. 267.
Cro. Eliz. 178.
Poph. 165.

DEBT on a bond. The condition was to ſurrender himſelf at the end of ſix days, as a true priſoner upon a *latitat* for, &c. *ac etiam pro debito* fourteen hundred pounds. Demurrer to the declaration, after *oyer* of the condition.

ARGUED, That a man may be let at large, and render himſelf again upon *meſne proceſs*, ſo that he be there at the return of the writ; and there was cited *Boyton's caſe*, (*a*) where that diverſity is allowed; and the caſe of *Benſon v. French*, (*b*) in caſe of a promiſe, and an *aſſumpſit* was brought thereon, and held good, and judgment for the plaintiff: the caſe is in * 1 *Keb.* 483. and no difference between a bond and an *aſſumpſit* as to this purpoſe.

Adjornatur. (*c*)

Kirby

* [95]

(*a*) 3 Co. 44.
(*b*) 15 Car. 2. in the King's Bench, 1 Lev. 98. 1 Sid. 132. 1 Keb. 483.
(*c*) In the report of S. C. 2 Jones 139. it is made a *quære* whether any judgment was given in this caſe. In the caſe of Benſon v. French, the Court gave judgment for plaintiff, becauſe the promiſe, though

Caſe 90. Kirby *againſt* Towerſon.

An endeavour to procure A. to conſent to marry the defendant, is a good conſideration in *aſſumpſit*, but a particular act muſt be ſtated.

S. C. Ray. 400. 1 Vent. 44. 27. Yelv. 11. 2 Vent. 71. Cro. Eliz. 760. Cro. Car. 159.

ASSUMPSIT, That if the plaintiff would endeavour to get *Jane's* conſent to marry the defendant, he would pay him ten pounds. And he avers that he did perſuade *her*, *et utebatur omnibus modis quibus poterat.*

The queſtion made was upon the word "*poterat*," becauſe uncertain.

But becauſe he had laid a particular act of perſuaſion, it was held good; being after verdict.

And judgment was given for the plaintiff.

Caſe 91. Harris *againſt* Roberts.

To ſay to an *heir*, that he has none of the *blood* of his anceſtors, is not actionable, for it does not import *baſtardy*.

1 Roll. Abr. 37. Jones 388. Cro. Jac. 213. Godb. 451. 2 Roll. Rep. 849. 1 Lev. 134. 1 Sid. 214.

CASE for ſcandalous words, ſpoken intentionally to diſinherit the plaintiff, &c. "You are no *Harris*, and have none of the "blood of the *Harris's* in you."

The judgment was arreſted, as in 1 *Roll. Abr.* 37; for THE COURT thought the words not actionable; for they might be meant as to courage, humour, or good nature, and did not of themſelves import him *a baſtard.* (*a*)

Judgment ſtayed.

(*a*) The caſe referred to in 1 Roll. Abr. 37. ſays, that to call a man, who has lands by deſcent, *a baſtard*, is actionable; but that to ſay of ſuch a man, that he is *baſe born*, is not actionable, becauſe theſe words, taken *in mitiori ſenſu*, do not import that he *is a baſtard.*

---

though made to *the bailiff*, was made on *the plaintiff's part*, and his aſſent thereto appearing by *his* bringing the action, the promiſe was intended to have been an *undertaking* given to *him*, 1 Lev. 98. But in the principal caſe it appears that the bond was given to *the ſheriff* by *the defendant* to permit *a priſoner* then in his cuſtody on *meſne proceſs*, to "go at large for ſix days," S. C. 2 Jones 139. which not being purſuant to the direction of 23 Hen. 6. c. 10. is void. Moor 542. 1 Saund. 161. The different circumſtances of theſe caſes create a *diſtinction* upon this ſubject, which was recognized and ſettled in the caſe of Rogers v. Reeves, Mich. Term, 27 Geo. 3. where it was held, that any agreement or bond not warranted by the 23 Hen. 6. c. 10. made or given to *the bailiff* of the ſheriff in conſideration of his diſcharging the party arreſted, is void; but that the *undertaking* of an attorney for the appearance of the defendant is good, becauſe it is given to the *plaintiff* in the action, and not to *the ſheriff*, and therefore not within the ſtatute, 1 Term Rep. 418.

The

The Trinity Houſe *againſt* Criſpe. Caſe 92.

Hilary Term, 31 Car. 2. Roll

DEBT on a bye-law, ſetting forth, That they were a corporation time out of mind, and had for all that time uſed to make bye-laws and orders for the better government of ſeamen; and ſet forth a charter of confirmation from the preſent king, and the bye-law they declared upon was, "That no ſhip, in any port of *England*, "ſhould be laden with gunpowder above twenty-four hours before "it puts to ſea, nor ſhould any be kept there above twenty-four "hours after it lies an anchor, *ſub pœna* forfeiture ſo much," and this they alledged to be for the public good for prevention of fires among the ſhips, &c. (*a*); then that the defendant did, &c. To which there was a demurrer.

Qu. If a bye-law made by the Brothers of the Trinity Houſe, that no ſhip laden with *gunpowder* ſhall continue in harbour longer than twenty-four hours, be good. S. C. 2 Jones 144. 5 Mod. 104. 6 Mod. 123. 1 Salk. 143.

* THOMPSON *for the plaintiff* argued, that bye-laws will not bind any ſtrangers, but only their own members if it concern a private matter, otherwiſe if it relate to the public: he cited the *Chamberlain of London's caſe*, 5 *Co.* 62. *Bulſt.* 11. and the caſe of *Franklin v. Green*, to prove this diverſity. * [96]

SAUNDERS *è contra*. All bye-laws do bind either *ratione loci* or *ratione perſonæ*; but theſe letters patents, and the bye-law in purſuance of them, extend to all mariners in *England*. If they are good, they have the effect of an act of parliament. A ſtatute can do no more than this bye-law of theirs. The defendant is not of their company; and the fact was at *Greenwich Court*. We muſt agree this bye-law to be good and uſeful for the weal-public: but again, on the other ſide, it is ſo general, and looks ſo much-like an act of parliament, that it ſeems too much for the power of a corporation or company to ordain. (*b*)

(*a*) See the ſtatutes 16 Car. 2. c. 21. 2 Jac. 2. c. 8. 5 Geo. 1. c. 26. 11 Geo. 1. c. 23. and 22 Geo. 2. c. 38. for the preventing of miſchiefs by keeping too large quantities of gunpowder in or near the metropolis.

(*b*) THE COURT ſaid, that the bye-law in this caſe was beneficial to the public; and the penalty, which was the forfeiture of twenty nobles, not too great; but upon the reaſon given by SAUNDERS, the judges took time to adviſe, S. C. 2 Jones 145.

——— *againſt* Fetherſton. Caſe 93.

TRESPASS on the caſe for ſtopping up ancient lights by the erection of a wall.

A *preſcription* pleaded in a *meſſuage*, or *tenement* is good. Poſt, 248.

A preſcription *in quodam meſſuagio ſive tenemento antiquo*, is good enough; though an ejectment will not lie *de uno meſſuagio ſive tene-*

v.
FETHERSTON.

mento, becauſe the ſheriff will not know what to deliver poſſeſſion of. (*a*)

Judgment for plaintiff.

(*a*) See Stiles 364. Cro. Eliz. 186. Cro. Jac. 125. Strange 834. Lord Raym. 1470. accord. But now the practice is for the ſheriff to deliver poſſeſſion according to the direction of the plaintiff, who therein acts at his peril. 1 Burr. 629. 5 Burr. 2673. Burr. Eject. 30. and therefore a leſs certain deſcription is now ſufficient than what was formerly required. See 1 Show. 367. 8 Mod. 277. 1 Stra. 54. 71. 695. Cowp. 347. 1 Term Rep. 11. 3 Mod. 238. 8vo. edit. notis.

Caſe 94. The Duke of Buckingham *againſt* Hatherington.

The Court will not change the *venue* in *ſcan. mag.* upon the uſual affidavit.

SCANDALUM MAGNATUM. The defendant moved to change *the venue* from *London* to *Yorkſhire*, upon the common affidavit, that the words were ſpoken in *Yorkſhire*, if any ſuch. And it was denied, unleſs the plaintiff would conſent.

Poſt
1 Sid. 185. 216. 1 Lev. 56. 2 Jones 192. Carth. 400. Salk. 668. Stra. 807. Ld. Ray. 1418. "1 Com. Dig. Action" (N. 13.) 1 Term Rep. 571. 647. 3 Term Rep. 306. 652.

Caſe 95. * Girton *againſt* Gilder.

* [97]

The ſpiritual court ſhall not be *prohibited* from proceeding on a libel for a penſion charged upon an impropriator.

A Prohibition to a libel in the eccleſiaſtical court for ſo much *per annum* for procuration, was granted on a ſuggeſtion that it was *a penſion* which charged the impropriator's inheritance. And in defence of the prohibition was cited *F. N. B.* 2. 51. 2 *Inſt.* 432. *Cro. Jac.* 266. *Hetley* 32. 2 *Roll. Abr.* 283. A preſcription is not triable there.

2 Roll. Abr. 300.
20 Hen. 6. pl. 17.
2 Inſt. 491.
1 Sid. 260.
Cro. Jac. 217. 666.
Cro. Eliz. 675.
N. Lut. 337.
1 Vent. 120.
1 Salk. 58. 506.
2 Lev. 251.
Hard. 181.
1 Mod. 218.

HOLT, *for a conſultation.* A preſcription about a ſpiritual matter may commence in another manner than an annuity can at the common law (*a*). This preſcription is by common law, and every eccleſiaſtical living charged therewith (*b*), and it is to be paid to the archdeacon for his viſitation; and no action lies for it at common law. (*c*)

SCROGGS *Chief Juſtice.* The legality of its commencement is nothing, for that is always ſuppoſed in every preſcription, and on the trial you only enquire if paid or not paid.

JONES *Juſtice.* Procuration is due of common right, as the *caſe of proxies* in *Davis's Iriſh Reports* clearly proves. At firſt the archdeacon with his ſervants at the viſitation were all entertained at the charge of the parſon; but when his retinue increaſed, a certain annual ſum became payable in lieu thereof; which is now due of common right, as DOLBEN *Juſtice* ſaid.

(*a*) Fitz. N. B. 152.
(*b*) Lindwood 67.
(*c*) See the ſix laſt paragraphs, Co. Lit. 162. chapter "of Rents."

SCROGGS

SCROGGS *Chief Juſtice.* They demand a compenſation for this procuration, and in ſome places, and from ſome perſons a greater ſum is paid than from others; and if the difference be about the *quantum*, we will grant no conſultation; but then in the ſuggeſtion they ought to have ſaid, that ſo much is due and no more, but here the whole is denied. GIRTON v. GILDER.

Adjornatur.

AGREED in this caſe, that a ſuggeſtion cannot be amended after a prohibition is gone, nor in this prohibition. PER TOUT LE COURT. A *ſuggeſtion* cannot be amended after *prohibition* granted.

* Lord Clare *againſt* Reach.

Caſe 96.

* [98]

ERROR on a judgment in ejectment in *Ireland:* (a) RESOLVED *per Curiam*, That a writ of error *coram nobis* is not a *ſuperſedeas*. Error *coram nobis*, no *ſuperſedeas*. Ante 85.

AND AGREED likewiſe, That conſent to a trial of title to land in another country than where the land is will not help; it being an error, though ſuch conſent be of record. Conſent of parties will not give juriſdiction to a court.

5 Co. 36. Cro. Eliz. 664. Co. Lit. 37. a.

(a) See the 23 Geo. 3. c. 53. by which the ſtatute 6 Geo. 1. c. 5. giving a writ of error from the courts in Ireland to the King's Bench and Houſe of Lords in England, is repealed; and the writ of error lies from the King's Bench in *Ireland* to the Houſe of Lords there, which is the *dernier reſort*.

Cole *againſt* Ireland.

Caſe 97.

TRESPASS. Special verdict finds letters patents to the defendant, of A HUNDRED in the county of *Leiceſter*, and the offices and profits thereunto belonging, with the execution of all writs within the ſame, for twenty-one years. A grant from the crown of a *hundred* in any county, and the offices and profits thereunto belonging, with the execution of all writs within the ſame, for twenty-one years, is void; for by the 2 Edw. 3. c. 12, and 14 Edw. 3. c. 9. *a hundred* cannot now be ſevered from *the county* by grant from the king.

The queſtion thereupon was, Whether they were good to the excluſion of the ſheriff from his duty and office of executing writs in his county, notwithſtanding the ancient ſtatutes, which were alſo found at large.

MR. LOVEL *for the plaintiff* agreed that all grants of hundreds before the time of *Edward the Second*, are good, but he argued that thoſe ſince are void.—But here it will not be amiſs to obſerve the original and nature of hundreds and ſheriffalties. I find in our books, that in *King Alfred's* time the kingdom was in groſs, and then

S. C. Raym. 360. S. C. 2 Jones 194. S. C. Pollexf. 606. S. C. Skin. 41. 1 Vent. 399. 412. 3 Mod. 199. 2 Nel. Abr. 942. 4 Mod. 345.

Colt v. Ireland.

divided into counties and hundreds, and all persons then came within one hundred or another (*a*), and then the king's relations had the government of them, and therefore they were called *consanguinei*, and so are the earls, lord lieutenants, &c. at this day; and then, when the office became troublesome, there were ordained *vicecomites*, which name remains to this day, and the others continue to be called *consanguinei*, but have no power in the county, having only the honorary name of *earls* or *comites* of such or such a county, &c. And for the better government of these counties, the *vicecomites* had two courts; but out of those the king granted petty leets and court barons; but the tourn of the sheriff had yet a superintendent * power, they being derived out of the sheriff's tourn, as in *Dyer* 13. And then afterwards the king granted away some hundreds in fee simple, and some franchises, and the last excluded the king utterly, but the hundreds granted in fee were not wholly exempt. On this arose some confusion, and the parliament hereon took notice, that the execution of justice was, by this much interrupted, and therefore came the statute, 9 *Edw.* 2. *st.* 2. *c.* 1. "That "sheriffs should be sufficient persons, and have lands in the county, "and so be able to answer both the king and country; and that "bailiffs and farmers of hundreds should be sufficient men." And at this time hundreds were grantable for years. Then came the statute, 2 *Edw.* 3. *c.* 4 *and* 5. "That sheriffs should continue "but for one year." But this took not away the whole inconvenience; for the crown still granted away bailiwicks and hundreds, for lives, at rents on such excessive dear rates that made them endeavour to make up their money by unlawful means; and thereon came the statute 2 *Edw.* 3. *c.* 12. and 14 *Edw.* 3. *c.* 9. By the first it was enacted, "That all hundreds and wapentakes granted "by the king, shall be again annexed to the county, and not se-"vered." And by the other statute, "That all shall be an-"nexed, and that the sheriff shall have power to put in bailiffs, for "which he will answer, and that no more shall be granted for the "future." And one reason of this was, because the king granted away hundreds, and abated not the sheriff's farm. Now this grant consists of all courts and profits of courts, and the officers and bailiffs thereof.

* [99]

FIRST, I conceive the grant of *courts* is not good; for the statute of 31 *Edw.* 3. *c.* 4. calls it "the sheriff's tourn." In the Year Book, 6 *Hen.* 7. *pl.* 2. it is adjudged not the king's court. In *Mitton's case*, 4 *Co.* 33. it was resolved that the county court is the sheriff's court, and that the king cannot grant away the office of clerk of the county court; but the sheriff ought to have the disposal thereof: and in all writs to the sheriff for making of proclamations, they say, "*in comitatu tuo*:" So is the return of exigents "*ad comitatum meum*;" and so is the stile of the Court, "*curia com' vicecomitis, &c.*" and so it is called in the statute of 32 *Hen.* 8. *c.* 13. and * therefore I do conclude the king has no power to grant them away from the sheriff.

* [100]

(*a*) Raym. 363. See also, 2 Roll. Abr. 73. 1 Vent. 403.

SECONDLY,

Secondly, For the *offices:* if the courts be the ſheriffs, then the offices muſt likewiſe be his: *Scrogg's caſe.* (*b*) The office of cuſtody of the gaol is likewiſe in the ſheriff, becauſe he is to anſwer for all eſcapes; ſo for the clerk of his county court, he is anſwerable for all his miſdemeanors.

Thirdly, For the *fines* and other profits of his court: and I conceive theſe cannot be granted from the owners: we find in the Year Books (*c*), that amerciaments in the tourn ſhall be to the uſe of the ſheriff, although the eſtreat be not returned till his year be out (*d*), for they are the conſideration why he is anſwerable over.

Fourthly, The *bailiff:* that is not grantable away, for all eſcapes by the bailiff are eſcapes by the ſheriff, and he is reſponſible, unleſs in caſe of franchiſes and liberties; nay he is anſwerable for bailiffs in fee. (*e*) Now in our caſe the king has granted the bailiſhip for twenty-one years, and the ſheriff cannot engage him to give any ſecurity, and yet is bound to anſwer for him: By the ſtatute above-mentioned a bailiff is not to continue in above one year.

Fifthly, The laſt thing is the *cuſtody of the hundred:* and this is the branch of the higheſt concern in the whole patent; now this grantee has not the means or power to keep the hundred as the ſheriff has, who can raiſe the *poſſe* of his whole county in his aid of any one part thereof; this grantee cannot do ſo without warrant from the ſheriff, ſo that it is not in his power to preſerve the peace as it is in the ſheriff's, who has by his patent the cuſtody of the whole county. I agree, the king may determine the office of a ſheriff as to the whole whenſoever he pleaſes; but he cannot determine the office as to part, becauſe it is entire, unleſs he divide the county and make more ſheriffs, which he may do. *Sir John Forteſcue's caſe* is expreſs for me. (*f*) By the ſtatute 14 *Edw.* 3. *c.* 9. all hundreds (except ſuch as were then granted in fee) are rejoined, as to the bailiwicks of the ſame, to the counties; and all grants * of the bailiwicks of hundreds, made ſince that ſtatute, are void; and the making bailiffs thereof belongs to the ſheriffs, for the better execution of juſtice, and of his office; and ſo is it reſolved in *Sir John Forteſcue's caſe,* which he there reports. And for theſe reaſons, and on thoſe caſes, I conclude the grant is void. * [101]

Mr. Bigland *è contrâ.* For the validity of this grant, I think it good. The reaſon of *Mitton's caſe* in 4 *Co.* 33. (*g*) is particular, becauſe of the entry and cuſtody of the rolls, for the embezzling whereof the ſheriff is anſwerable. But to conſider what the king's power was at the common law as to the conſtitution of a ſheriff. (*b*) He can make two ſheriffs, as he did for *Buckingham-*

(*b*) Dyer 175.
(*c*) 1 Edw. 3. pl. 2.
(*d*) 6 Hen. 7. pl. 2.
(*e*) Bro. Abr. "Franchiſe," 24. Dyer 24. Fitz. Abr. 22.
(*f*) 4 Inſt. 486.
(*g*) S. C. 2 Roll. Abr. 75.
(*b*) See the caſe of Villa de Derby, 1 Foxley. 1 Roll. Rep. 118.

Cole v. Ireland.

ſhire and *Oxfordſhire*, which had formerly but one ſheriff; and ſo for *Leiceſterſhire* and *Warwickſhire*. He may grant the return of writs to *a vill*, which takes not away the ſheriff's general juriſdiction, but only his immediate juriſdiction. The king has granted *court barons* and *hundred courts*, which by his letters patents are derived out of *the tourn*, and do diminiſh the ſheriff's profit. (*i*) And, notwithſtanding the courts here ſettled in *Weſtminſter-hall*, he may grant to one to hold pleas within a certain precinct: As for an hundred; (*k*) by the common law a hundred belongs to the king of common right; and whoſoever will claim it muſt derive it from the crown. (*l*) Now for the ſtatutes: thoſe which concern this matter are found in the ſpecial verdict, and the penning of them will give determination to this matter. The firſt ſtatute extends only to thoſe hundreds let by king *Edward the Second*, and leaves the reſt at liberty. As for the 14 *Edw.* 2. *c.* 9. it is thus, "All "wapentakes and hundreds which be ſevered from the counties ſhall [102] "be annexed, &c." and this is relative to the former; upon the * reading hereof it plainly appears it cannot extend to all; and it is a general rule that where ancient grants are dubious, they ſhall be conſtrued and expounded according to uſage. And here is no damage to the ſubject; for the ſame remedies are by the ſtatute made for bailiffs as for ſheriffs; (*m*) and if there be defect in them, the ſheriff has ſtill a power ſuperintendent. Where no grants have been made ſince thoſe ſtatutes, you will intend they were ſet by *Edward the Second*, and ſo are annexed to the counties by thoſe ſtatutes; but thoſe which have been granted ſince are not within it: this was granted by *Edward the Fourth*.

Adjornatur.

In *Eaſter* Term, in the Thirty-fourth year of *Charles the Second* the grant was reſolved void, and judgment given for the plaintiff.

(*i*) 2 Inſt. 11.
(*k*) See the Year Books, 8 Hen. 7. pl. 2. 13 Hen. 7. pl. 2. 12 Hen. 7. pl. 167.
(*l*) Year Books, 1 Hen. 4. pl. 90. 13 Hen. 4. pl. 9. 2 Roll. Abr. 73.
(*m*) Cro. Jac. 551. 1 Roll. Abr. 349.

Caſe 98. The King *againſt* Ballatt.

Commiſſioners of bankrupts cannot *re-examine*, except upon a new commiſſion.

1 Salk. 111, 112.

THE defendant, being committed by commiſſioners of bankrupt, was brought hither by *habeas corpus*.

IT WAS AGREED upon debate about the return, That commiſſioners having once examined a man cannot examine him again, unleſs it be upon a new commiſſion. (*a*)

But *quære*, if their examinations be loſt by fire, &c. whether there ought in ſuch caſe to be a new commiſſion.

(*a*) But ſee the caſe of Rex v. Perrott, 2 Burr. 1124; and Cooke Ban. Laws, 2 edit. 474.

Memorandum.

Memorandum.

Serjeants called.

IN CHANCERY, this term, on the twelfth day of *May*, appeared SIR GEORGE JEFFREYS, SIR JOHN KELYNGE, HAMSON, WEST, WALCOTT, BOYNTON, BIGLAND, RICHARDSON, BUGBY, WRIGHT and MANLEY; each with the writ in his hand, which was to appear *in cancellar' ad proficiend' ad ſtatum et gradum ſervientis ad legem ſub pœna mille librar'*. Then they prayed their writs might be read, and their appearance recorded, which was done. Then they took the oaths of ſupremacy and allegiance all together; then they ſeverally took the ſerjeant's oath; "YOU "*ſhall ſwear, that well and truly you ſhall ſerve the king's people* "*as one of the ſerjeants at law, and you ſhall truly counſel them* "*that you ſhall be retained with, after your cunning, and you ſhall* "*not defer, tract, or delay their cauſes* * *willing for love of money, or* "*covetous of any thing that may turn to your profit; and you ſhall give* "*attendance accordingly, as God you help by the contents of this book.*"

* [103]

Ruſhworth *againſt* Hodſon. Caſe 99.

If one of two partners become a bankrupt, the aſſignees cannot maintain *trover* for money due to the *partnerſhip*, but they may recover a *moiety* in an action of *debt*.

TROVER and converſion of money as aſſignee of the commiſſioners of bankrupt, of *Forth* the bankrupt.

In the evidence on a trial at THE BAR the caſe appeared to be thus: Two creditors, joint brewers; one became a bankrupt; the whole debt is aſſigned over.

RESOLVED, That *debt* would have lain, and the aſſignee ſhould have recovered a moiety; for one moiety only did paſs by the aſſignment: but as in this caſe the money was received as the joint traders money, here the aſſignee cannot bring *trover* for the whole, becauſe he lays, by that, the ſole property in himſelf, which is not ſo; and an aſſignee can only have ſuch action as the bankrupt himſelf might have had. (*a*)

Poſt N. Lut. 85. 1 Vezey 242. 1 Salk. 392. 3 Salk. 61. Ld. Ray. 871. 2 Term Rep. 476.

4 Burr. 2176. Cowp. 448. 471. 469.

(*a*) See Weſt v. Skipp. 1 Vezey 239. Brown v. Hodges, 1 Salk. 290. Fox v. Hanbury, Cowp. 448. Smith v. De Silva. Cowp. 469. Holliday v. Camſel and White 1 Term Rep. 658.

Anonymous. Caſe 100.

Qu. In treſpaſs, and no property laid in the plaintiff as to part of the goods taken, whether he can have judgment, on a general demurrer, for the part that is well laid.

TRESPASS for taking of ſeveral goods; and as to ſome the plaintiff lays no property in himſelf, and in others he does; and the demurrer is general to the declaration.

———Ante 56. 88 92. Poſt 183.

It

ANONYMOUS. It was ſaid that in ſuch caſe, upon prayer of the plaintiff, judgment may be given for that which is well laid; ſo in *trover*; ſo in *caſe* upon two promiſes; and this has been frequently done before a *writ of inquiry*; otherwiſe afterwards, for then if entire damages be given it cannot be ſo. (*a*)

Per MR. ATTORNEY GENERAL, and MR. SERJEANT MAYNARD, and MR. ASTON, and MR. WOODWARD the clerks.

Tamen quære; for THE COURT doubted it.

(*a*) Dougl. 377. 730.

Memorandum.

Conſpiracy. THIS TERM *Le Marre* and his mother, and one *Loveland* were tried and convicted of a conſpiracy to charge *the duke of Buckingham* with buggery.

Trinity

* Trinity Term,

The Thirty-firſt of Charles the Second,

IN

THE EXCHEQUER CHAMBER.

KING'S BENCH.		COMMON PLEAS.	
Sir WILLIAM SCROGGS, *Knt. Chief Juſtice.*		*Sir* FRANCIS NORTH, *Knt. Chief Juſtice.*	
Sir THOMAS JONES, *Knt.*	*Juſtices.*	*Sir* WILLIAM ELLYS, *Knt.*	*Juſtices.*
Sir WILLIAM DOLBEN, *Knt.*		*Sir* JOB CHARLTON, *Knt.*	
Sir THOMAS RAYMOND, *Knt.*		*Sir* HUGH WYNDHAM, *Knt.*	

EXCHEQUER.

WILLIAM MONTAGUE, *Eſq. Chief Baron.*
Sir EDWARD ATKINS, *Knt.*
WILLIAM GREGORY, *Eſq.* } *Barons.*
Sir RICHARD WESTON, *Knt.*

Sir CRESWELL LEVINZ, *Knt. Attorney General.*
Sir FRANCIS WINNINGTON *Knt. Solicitor General.*

Murry *againſt* Eyton and Price, OR the Earl of Derby's Caſe: Caſe 101.

EJECTMENT for the manor of *Hope*, otherwiſe *Queenhope*, *&c.* in the county of *Flint*, on the demiſe of *William George Richard*, earl of *Derby*, made the ſecond day of *May* in the ſecond year of *Charles the Second*. Upon not guilty pleaded the jurors find a ſpecial verdict to the effect following.

The ſtatutes 4 Hen. 7. c. 24. and the 32 Hen. 8. c. 36. enable a tenant in tail to bar all his *iſſue* by a fine with proclamation levied purſuant to the ſtatute 4 Hen. 7. c. 24; for they are *privies* to him both in *blood* and in *eſtate*; but ſuch a fine levied by a tenant in tail, of the gift of the crown, the *reverſion* in the crown, will not bar the iſſue in tail; for it is protected by the ſtatute of 34 and 35 Hen. 8. c. 20. although by a private act of parliament it be limited to the heirs male of the family in a different manner from that in which it had been limited by the letters patent, provided the alterations are all within the compaſs of the old intail, and the reverſion continues in the crown.——S. C. Skin. 95. S. C. Ray. 260. 319. 338. S. C. Pollexf. 491. S. C. 2 Jones 237.

RICHARD

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RICHARD THE THIRD was ſeiſed in fee of this manor in right of THE CROWN, and, in the ſecond year of his reign, among other things, granted the ſame to *Sir Thomas Stanly* (afterwards *Earl of Derby*) and *Sir George Stanly* his ſon and heir apparent, to hold to them and to the heirs males of the body of the ſaid *Sir Thomas*, by knight's ſervice; and they find the letters patents *in hæc verba*: that *Sir George* had iſſue *Thomas Stanly* (afterwards *Earl of Derby*) and died in his father's life-time; then *Sir Thomas* the patentee dies, and the manor deſcends to *Thomas* the grand child, and from him deſcended to *Edward* his ſon, and from him to *Henry* his ſon, and from him to *Henry*, and from him to *Ferdinand*; that *Earl Ferdinand* had no iſſue male, but left three daughters, VIZ. *Ann* married to *Lord Chandos*; *Frances* to *Sir John Egerton*; and *Elizabeth* to the *Earl of Huntingdon*; that by the death of *Earl Ferdinand*, the manor deſcended to *William Earl of Derby* his brother; that he entered and was
*[105] ſeiſed in tail male: that afterwards * for determining certain differences ariſen between *Earl William*, and the daughters of his brother *Earl Ferdinand*, and their huſbands, on the eighteenth day of *November*, in the fourth year of *James the Firſt*, there was an act of parliament made, whereby it is, *inter alia*, enacted, "That *Alice* counteſs of "*Derby*, during her life, and after her deceaſe *William Earl of Derby* "for his life; and after his deceaſe *James* his ſon and heir apparent, "and the heirs males of his body; and for default of ſuch iſſue, the "ſecond, third, fourth, fifth, ſixth, and ſeventh ſons of *Earl William*, "and the reſpective heirs males of their reſpective bodies ſucceſſively; "and for default of ſuch iſſue *Sir Edward Stanley* during his life, "and afterwards his firſt, ſecond, third, fourth, fifth, ſixth, and "ſeventh ſons, and the heirs males of their reſpective bodies ſuc-"ceſſively; and for default of ſuch iſſue, *Edward Stanley*, for his "life, and after his deceaſe all his ſons to the ſeventh, and the heirs "males of their reſpective bodies ſucceſſively; and in like manner "*James*, the brother of *Edward* for his life, and after his deceaſe and "all his ſons to the ſeventh, and the heirs males of their bodies ſuc-"ceſſively, ſhall enjoy this manor." They find further, that in that act there is a PROVISO, that *Earl William*, *Sir Edward Stanley*, *Edward Stanley*, and *James* his brother (who had only for their lives) when actually ſeiſed, might make leaſes, by indenture, of any term not exceeding twenty-one years, or for one, two, or three lives or years ſo determinable, reſerving uſual rents; and to make jointures for their reſpective wives, or eldeſt ſons wives, not exceeding a third of the whole.—And they find further, that there is a PROVISO, that the king, his heirs and ſucceſſors (except ſuch as have eſtates by that act, &c.) ſhall have and enjoy the ſame, and ſuch eſtate and eſtates, rights, titles, intereſts, *reverſions*, rents, ſervices, tenures, primer ſeiſin, liveries, warranties, uſes, poſſeſſions and demands as before, &c.—And they find *Sir Edward* and *James* to be perſons inheritable to the firſt intail *ſecundum formam doni*, *&c. ſi*, &c. They find *Alice* died the firſt of *May*, 1636; that *Earl William* entered and died the 29th of *September*, 1642; that *Earl James* entered and died the 15th of *October*, 1651; that *Earl Charles* his ſon entered and was ſeiſed *prout lex poſtulat*; that he and the *Lady Dorothea Helena* his wife, 14 *February*,

† 1653,

1653, made a feoffment and grant, executed by livery and attornment * of tenants, of this manor to *Sir Charles Wolſely* and others their heirs, with a covenant to levy a fine; and afterwards the 10th of *April*, 1654, levied a fine with proclamations in the court of grand ſeſſions for the county of *Flint*, of this manor, to *Sir Charles Wolſely*, and others, and their heirs: and they find that *Earl Charles* afterwards, 21 *December* 1670, died; that the now *Earl of Derby* is his ſon and heir, and then was of the age of ſixteen years and nine months and fourteen days; and that he entered the ſecond day of *February*, in the twenty-ninth year of *Charles the Second*, and made the leaſe to the plaintiff, who entered and was poſſeſſed till the defendant ejected him: and they find the act of 34 and 35 *Hen.* 8. *c.* 20. againſt feigned recoveries by tenant in tail, where the reverſion is in the king. And whether the defendants are *guilty* they know not, but pray the advice of the court upon the whole matter. * [106]

This caſe was firſt argued in the court of Exchequer, and THE BARONS being divided, two againſt two, the cauſe was then adjourned into the Exchequer Chamber, *propter difficultatem*, before all THE TWELVE JUDGES, where it was argued on the behalf of the *Earl of Derby*.

Two queſtions were made:

FIRST, Whether the act of king *James the firſt* has ſo altered the eſtate as to render it out of the 34 & 35 *Hen.* 8. *c.* 20?

SECONDLY, Whether the tail was barrable by fine by the ſtatute of 4 *Hen.* 7. *c.* 14?

For THE FIRST it was argued, that there was no alteration in ſubſtance, for though *the counteſs* had now an eſtate for life, ſhe was dowable before; and although here is a liberty for the iſſues to make a jointure, yet it is but a third part; and that their wives might claim in right of dower before the act; and although there be ſeveral eſtates added, yet they are all of perſons who were inheritable to the tail, and it is but a new moulding of it; it remains the ſame thing in ſubſtance; the eſtate tail is the ſame thing as to continuance of time: there is a very full proviſo for the ſaving to the king his reverſion, &c. cited *Co. Lit.* 372. That the parliament only new ſhaped the eſtate, and is not the donor; but the king gave it by the letters patents.

And as for THE OTHER POINT, the parliament by 32 *Hen.* 8. *c.* 36. enacts fines to be a bar, becauſe they thought * that of 4 *Hen.* 7. *c.* 14. did not; and 34 and 35 *Hen.* 8. *c.* 20. ſays "it ſhall "be a bar to common eſtates tail, and not to ſuch whoſe reverſion is "in the crown:" Until the reign of *Henry the eighth* eſtates were not forfeitable for treaſon (*b*) much leſs barrable by fine: The ſtatute *de* * [107]

(*b*) See Brown v. Waite, 2 Mod. 131. S. C. 2 Lev. 169. S. C. 1 Vent. 299. S. C. Poſtea. 185. S. C. 2 Jones, 57.

modo

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modo levandi fines has the very ſame words in it as that of 4 *Hen.* 7. *c.* 14. and yet it was never thought a bar.

MR. HOLT *è contrâ* for the defendant.—As to THE LAST POINT, that a fine would have barred the iſſue by the ſtatute 4 *Hen.* 7. *c.* 14. the words "any lands or tenements" ſhould elſe be void unleſs to bar the iſſue, for before that ſtatute tenant in fee could have barred his heirs by fine. As to the objection that the ſtatute *de modo levandi fines*, has not been extended to the iſſue in tail though it has the word "privity" in it, he anſwered, that it does not *enact* but *declare* the uſe of a fine at the common law; if the 4 *Hen.* 7. *c.* 14. did bar, then 32 *Hen.* 8. *c.* 36. is out of the caſe; and by *Co. Lit.* 372. the king having the reverſion the eſtate tail is barred by 4 *Hen.* 7. *c.* 14. 1 *And.* 171. compared with *Moor* 250. 3 *Co.* 90.

As to THE OTHER POINT he urged, that they are other eſtates now than before, and are therefore barrable. (*c*) A fine makes an alteration in an eſtate, though it be the ſame in its proportion as before; much more an act of parliament. (*d*) This tail is barrable becauſe it is raiſed out of a ſubject's eſtate, and not out of the king's: ſuppoſe tenant in tail, reverſion in the king before the 34 and 35 *Hen.* 8. *c.* 20, ſuffers a common recovery to the uſe of himſelf for life and in tail, remainder to himſelf; afterwards comes the 34 and 35 *Hen.* 8. *c.* 20; if the remainder fall, he might bar his iſſue notwithſtanding the reverſion were in the crown. Now this eſtate is raiſed by act of parliament, (*e*) and the act of *king James* quite deſtroys the former gift. The tenant for life thereby has powers which tenant in tail has not, as to make jointure for his own wife and for his ſon's wife. And as to the objection, that though this caſe be not within the words, yet it is within the reaſon of the 34 and 35 *Hen.* 8. *c.* 20. I anſwer, that this act being in reſtraint of alienations, ought to be
* [108] conſtrued ſtrictly, as the ſtatute * *de donis* was always taken ſtrictly in thoſe words, "they may not alien," yet they may alien for their lives, 2 *Inſt.* 335. *Lord Cheſterfield's caſe.*

MAYNARD *Serjeant* argued on the ſame ſide; he wondered the queſtion ſhould be revived, whether iſſue in tail be a privy within the ſtatute of 4 *Hen.* 7. *c.* 14. and argued, that ſince the act of *king James*, this eſtate is not within the 34 and 35 *Hen.* 8. *c.* 20. for the iſſue in tail in *a formedon*, ſince that of *king James*, cannot make a donor, (*f*) and the eſtate created by the ſtatute made in the fourth year of *James the firſt* is merely out of the eſtate tail which was before, and not out of the king's eſtate or reverſion, and the eſtate given by *king James* can never determine ſo long as the ancient tail remains, and therefore not out of the king's reverſion: the reaſon of a *common recovery* being a bar, is not for that it is a common aſſurance, (*g*) for at common law there was no falſifying by tenant in tail; nay, at common law it was a doubt whether it were not

(*c*) Bro. Abr. "Remitter," pl. 50.
(*d*) 6 Co. 41. 1 Roll 39.
(*e*) 2 Co. 46.
(*f*) Hob. 277.
(*g*) 2 Lev. 27. 29. 55. 2 Salk. 51.

to of tenant for life; the bar aroſe from the ſtatute *de donis* and *Weſtminſter the ſecond.* In a recovery the court cannot judge whether there be a right or no in the perſons that ſuffer a recovery to ſuffer it or not; becauſe being of an inheritance there lies no falſification, which is the reaſon of a recovery being a bar: the authorities that ſeem againſt me are *Stafford's caſe*, (*b*) the caſe of *Warren v. Smith*, (*i*) *Stratfield v. Dover*, (*k*) to which I anſwer, judgment was given in thoſe caſes upon the point of pleading. (*l*) *Hobart* ſays, (*m*) that the judgment in *Stafford's caſe* was a very oblique and indirect ſtrain. It is out of the words of the ſtatute. The deſign was againſt recoveries only, and the words, "or any other thing," refer to the whole where there was a recovery ſuffered: general words in a ſecond act of parliament ſhall not take away a power which was given by a former act; as here a power is given by 4 *Hen.* 7. *c.* 14. and 32 *Hen* 8. *c.* 36. then comes 34 *Hen.* 8. *c.* 20. after it; (*ſee* 29 *Edw.* 3. laſt caſe ſave one, and *Keilway* 173. and *Noy* 14.) there was more reaſon they ſhould provide againſt *a recovery* by 34 and 35 *Hen.* 8. *c.* 20. than againſt *a fine*, for that a recovery might have operated further than againſt a tenant in tail's own iſſue.

*I did not hear MR. SAUNDERS, or MR. WILLIAMS, who argued this caſe, as did alſo MR. POLLEXFEN, (whoſe argument is now in print (*n*) nor did I hear the judges, except MR. BARON STREET, JUSTICE LEVINZ, and LORD CHIEF JUSTICE PEMBERTON. *[109]

STREET *Baron*, (*o*) in Hilary Term 33 & 34 *Car.* 2. argued the ſame points: as to the firſt, that *Maſter Littleton* (*p*) was expreſs, that if the reverſion or remainder be in the king, tenant in tail cannot bar, &c.; the contrivance of the common recovery made way for the 4 *Hen.* 7. *c.* 24. and it was a doubt in the 19 *Hen.* 8. whether the iſſue of a tenant in tail of the gift of a ſubject were barred by a fine. (*q*) Then comes 34 & 35 *Hen.* 8. *c.* 20. that it ſhall not bar; and this law has always had a ſtronger and more favourable conſtruction than the 4 *Hen.* 7. *c.* 24; and he cited *Brooke* (*r*) *Dyer* (*s*) *Wiſeman v. Bunand* (*t*) and *Jackſon v. Darcey*, (*u*) which is another expreſs authority, that the ſtatute of 4 *Hen.* 7. *c.* 24. is not a bar. (*x*)

As

(*b*) 6 Co.

(*i*) 1 Roll Rep. 151 to 172; and NOTE, this is the ſame caſe as Magdalen College Caſe, 11 Co. 66.

(*k*) Cro. Eliz. 595. See alſo Co. Lit. 373. a. Moor 467. 1 Wilſ. 275. 4 Bac. Abr. 196. Pigot on Recov. 92.

(*l*) See S. C. Cro. Eliz. 612.

(*m*) Macwilliam's caſe, Hob. 333. NOTE, This caſe is not inſerted in the quarto edition of Hobart's Reports.

(*n*) Pollexfen's Reports, 491 to 521.

(*o*) SIR THOMAS STREET, *Knight*, was ſworn a Baron of the Exchequer on the 23d April 1681, 33 Car. 2. in the place of SIR RICHARD WESTON, who died on the 23d March preceding Ray. 430. 431.

(*p*) Co. Lit. 373.

(*q*) Co. Lit. 372. Ray. 349. 2 Jones, 252. Cruiſe on Fines, 269.

(*r*) Bro. Abr. title "Fines levies de tenes," pl. 121.

(*s*) Dyer Rep. 32. and the margin. L. C. J. TREBY refers to the caſe of Ld. Nottingham v. Ld. Munſon, in Hilary Term, 5 Car. 1. in Chancery.

(*t*) 1 And. 142.

(*u*) Moor, 115. and the ſame caſe, Bendloes, 223. S. C. 1 And. 46. S. C. 3 Leon. 57. S. C. 4 Leon. 40.

(*x*) See Wiſeman's caſe, 2 Co. 15. Bro. Abr. "Aſſurance," pl. 6. Hob. 257.

Co.

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As to THE SECOND POINT, he thought that minute things and ſmall matters ſhould not make an alteration; none are let in here into the eſtate tail, but ſuch who were in *ab origine*; no new perſons brought in; the inheritance goes ſtill with the ſame family: then there is a ſaving to the king, his heirs, &c. in the ſame manner, ſo that the ſame eſtate which the king had before he has ſtill, not in the leaſt altered; if the king were donor before this act (as certainly he was) then he continues ſo; it all does here remain in the iſſue male of this honourable family: it is true, if the crown ſhould give leave to alien or join in an alienation, or had aliened the reverſion, then the iſſue might have been barred, *Wiſeman's caſe*, (*y*) I agree, that if the reverſion had been free but for an hour (though regranted to the crown) yet it would not be within 34 and 35 *Hen.* 8. *c.* 20; the nature of a ſaving is not to create a new right but to preſerve an old one; and there are no words in this act that do diveſt him of his reverſion: So that upon the whole matter I conceive that judgment ought to be given for the *Earl of Derby*.

*[110] *LEVINZ *Juſtice*. The firſt queſtion is, Whether or no this act of 4 *Jac.* has made ſuch an alteration as that it is now become an eſtate out of the 34 & 35 *Hen.* 8. *c.* 20. SECONDLY, Whether ſuch an eſtate, the reverſion being in the crown, not of the gift of the king, but now as altered by this ſtatute, be barred by this fine? For the little points that have been ſtarted, the reverſion being in the crown, there can be no diſcontinuance; the ſtatute of limitations is nothing to the caſe, for *Charles* could not have entered againſt his feoffment; and another thing is *the warranty* which ſignifies nothing, being lineal, and no aſſets found.

As to THE FIRST POINT I think and agree, that no eſtate is within the 34 & 35 *Hen.* 8. *c.* 20. but what is of the gift of the king, (*z*) and this is ſuch. And by the ſtatute 4 *Jac.* 1. nothing is given but what is within the patent, and no perſons within the one but what were within the other; as there is no greater eſtate in quantity, ſo is it the ſame in quality; beſides, this act is made to countenance an award, and it cannot be extended further than the award itſelf; the nature of every conſequential thing ought to be taken from its principal, (*a*) and theſe arbitrators had no power to make the lands alienable; the words are "ſaving to the king his tenure, reverſion, &c." and then it is, "they ſhall be held and enjoyed," which are not proper words to create an eſtate, or to alter one. Now ſhall this act, by an oblique conſtruction, come and take from the king that privilege which 34 & 35 *Hen.* 8. *c.* 20. had given him? It is commonly ſaid in our books, that the king's grants ſhall not enure to two purpoſes.

Co. Lit. 325. 373. 375. Cro. Eliz. 595. 8 Co. 78. and Lord Chandois caſe, 6 Co. 55.

(*y*) 2 Co. 15. S. C. Moor, 195. S.C. 1 And. 140.

(*z*) See Co. Lit. 372. Pigot on Recoveries, 201. 11 Mod. 304. 1 Bl. Rep. 654. 4 Burr. 2223.

(*a*) 8 Co. 78. 2 Brownl. 253.

poſes. (*b*) Now if the tenure be not altered then the king continues donor. Every donee ſhall hold of the donor; I ſay, every donee ſhall ſo do, yea, even in *frankmarriage* till the fourth degree be paſt, although he do no ſervices. If an alienation be good, pray of whom do thoſe men hold? They muſt hold of my *Lord Derby*, for he has the immediate reverſion: the powers given were only to make *jointures*, which was the ſame as *dower* was before, and then they make him tenant for life to prevent waſte; then for jointure the words are, "excepting the capital meſſuage belonging to the family." We know, where the huſband is tenant in tail, that the wife * ſhall not be endowed of the *capital meſſuage*. The ſtatute *de donis* has been conſtrued as largely as any ſtatute whatſoever, for more eſtates have been conſtrued to be tail within it, than are mentioned there. The ſtatute of 34 and 35 *Hen.* 8. *c.* 20. has alſo been conſtrued largely, (*c*) for all recoveries that have been ſuffered ſince have been conſtrued within it, although the words of the act literally ſeem to intend only recoveries before the act: it has been objected, that if *my lord* were to bring a *formedon*, he muſt ground it on 4 *Jac.* 1. and therefore he is in by that: I anſwer, this is a *ſuppoſitum quod non eſt ſupponendum*; for the reverſion being in the crown there cannot be any *diſcontinuance*, and therefore no *formedon*, although there might be a bar. But ſuppoſe it ſo, if for *a deſcender* or *a remainder* it may be founded on the act, but for *a reverter* he muſt found it on a ſeiſin before the act. If my *Lord Derby* were now to bring a *formedon* on the ſtatute, they would plead the fine in bar, and if he ſhould reply the patent of *Richard the Third* that would be *a departure* from his count, and therefore I think he might bring it on his patent, and ſo diſcloſe his whole caſe; and I am of opinion that in that caſe, he ought to recover: but ſuppoſing it an eſtate tail by act of parliament, with a reverſion in the crown, and ſuppoſing the ſtatute of 34 & 35 *Hen.* 8. *c.* 20. out of the act: I think the fine no bar by 4 *Hen.* 7. *c.* 14. The objection is, what becomes then of all the fines levied between the 4 *Hen.* 7. *c.* 14. and 32 *Hen.* 8. *c.* 36. I anſwer, that a fine at common law with a year's poſſeſſion and non-claim, was in effect the ſame bar, with a recovery in a writ of right and poſſeſſion for an year and a day; and there were then the common exceptions of infancy, impriſonment, over the ſeas, &c. 2 *Inſt.* 517. The ſtatute adds nothing of validity; but becauſe the fine was ſo high a bar, it requires ſeveral ſolemnities to be added; it does not enact the fine to be a bar, but only ſays, "becauſe it is ſo;" ſo that, as to the bar, it is but declarative of the common law, and not introductive of a new law: as to the ſolemnities 2 *Inſt.* 516. a fine was never taken to be a bar of an eſtate tail upon any of thoſe ſtatutes, but upon a non-claim for a year and a day, *Litt.* 262. and yet ſome * perſons were barred who could not claim within the year and day, as reverſions and remainders; thus the law ſtood for above two hundred years together, that a fine was no bar; then comes 4 *Hen.* 7. *c.* 24. and enacts, "that fines ſo levied "ſhall conclude privies as well as ſtrangers;" theſe are the words.

* [111]

* [112]

(*b*) Year Book, 17 Edw. 3. pl. 39. (*c*) Co. Lit. 372. 7 Co. 13.

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I cannot ſee by what colour it was ſaid at the bar that that ſtatute was made on purpoſe to bar eſtates in tail, for all the reſt of the ſtatute are ſavings and ſolemnities: the ſtatute *de donis* has not been taken ſtrictly (*d*). Eſtates tail are not forfeited by *præmunire*, nor are they within the *ſtatute of recuſancy*: there are two ways of convicting recuſants; if it be by proclamation his eſtate may indeed be ſeized upon the king's election of a third part, or by way of diſtreſs for twenty pounds per month, but when he dies his land ſhall be diſcharged in the hands of his heir, for the words "tenement or hereditament" will not reach it; but otherwiſe when convicted by trial on a *venire*, and judgment againſt him thereupon, for then he becomes a debtor to the king; and thereby eſtates tail are forfeited to the king by the word "hereditaments," (*e*) The ſtatute of 32 *Hen.* 8. *c.* 36. bars eſtates tail in plain words; tails were always reckoned incumbrances, and endeavoured to be ſet at large; my *Lord Coke* (*f*) ſays it bars by both of them; but I do not find that there was any ſettled opinion that they were bars by 4 *Hen.* 7. *c.* 24. but only by 32 *Hen.* 8. *c.* 36; and I do not ſee in my judgment how fines could be bars in any caſe by 4 *Hen.* 7. *c.* 24. which were not ſo by the ſtatute *de modo levandi fines*; and therefore tails are not within it. Where the reverſion is in the crown I think the fine cannot be a bar; the enacting clauſe is for all ſorts; and then the proviſo excepts the king's donees: can it be ſuppoſed that when a parliament takes notice of a doubt, whether fines ſhould be bars, that they ſhould leave it as much a doubt as before: and therefore I think they took it to be no bar. *Stafford's caſe* (*g*) was not ſolely adjudged on the general words of 34 *Hen.* 8. *c.* 20. but on the 32 *Hen.* 8. *c.* 36.; "Other ways or means" ſhall extend to lower, but not to any
* [113] thing of higher degree than what was mentioned before. (*h*) A * fine was above a recovery, and an old common law bar, and therefore cannot be within the words "other thing or things." The caſe in *Dyer* 29. 1 *And.* 46. was the gift of a common perſon; in *Bro. Aſſurance*, 6. *Bro. tit.* "*Fines de terres*," 126. it was a contemporary opinion; and he in all probability was privy to the making of the act. 2 *Co.* 15. there is my *Lord Coke* in his *Reports* againſt my *Lord Coke* in his *Inſtitutes*; in *Stafford's caſe*; (*i*) and the caſe of *Little v. Notley*, (*k*) there is not one word in it of 34 & 35 *Hen.* 8. *c.* 20; for my part I do not reſt upon my *Lord Coke's* reaſon of diſcontinuance; I am of opinion that judgment ought to be for the plaintiff.

PEMBERTON *Chief Juſtice*, in Hilary Term, 34 & 35 *Car.* 2. argued this cauſe; a copy of whoſe argument from his own manuſcript is as follows:—In this caſe the general queſtion is, whether this fine with proclamations, levied by *Earl Charles*, has barred the leſſor of the plaintiff, being ſon and heir male of the body of *Charles*; and

(*d*) 11 Co. 65.
(*e*) Year Book, 19 Hen. 8. pl. 6. Brook Abr. "Tail" 2. Hobart, 332. Dyer, 32.
(*f*) 2 Inſt. 517
(*g*) 8 Co. 78.
(*h*) 2 Co. 46.
(*i*) 8 Co. 78.
(*k*) Savil. 106.

alſo heir male of the body of *Thomas*, the firſt donee? But this has been conſidered under two more particular queſtions.

FIRST, Whether the ſtatute of 4 *Hen.* 7. *c.* 24. whereby it is enacted, "that fines levied with proclamations" in ſuch manner as by that ſtatute is directed "ſhall be a final end and bar, as well to "privies as ſtrangers" (except ſuch perſons whoſe intereſts or eſtates are preſerved by the ſalvos or exceptions therein contained) extends to enable tenants in tail in any caſe to bar their iſſue?

SECONDLY, Admitting that a tenant in tail is enabled by the ſtatute of 4 *Hen.* 7. *c.* 24. to bar his iſſue by fine, then whether this manor being originally of the gift of the crown to the anceſtor of *Earl Charles*, with the reverſion left in the crown, and ſo protected from being alienated from the iſſues by the 34 & 35 *Hen.* 8. *c.* 20. be now ſet at large, and the eſtate ſo altered by the act of parliament made in 4 *Jac.* as that it might be barred by the fine of *Earl Charles?* or (as ſome that have argued have put it in other terms) whether the ſtatute of 4 *Jac.* has deſtroyed the firſt eſtate given by *Richard the Third* and created ſuch new eſtates of this manor * in the family of the *Earl of Derby*, as that now a fine may bar the iſſues in tail? * [114]

This I take to be the ſubſtance of the two queſtions made in this caſe, and I ſhall follow the ſame method, and in delivering my opinion ſhall conſider them both: I ſhall firſt ſtate the firſt queſtion as it relates to the caſe in hand. The ſtatute of 4 *Hen.* 7. *c.* 24. makes fines to be a final end, and enacts, "that they ſhall con-"clude privies as well as ſtrangers, except, *&c.* Then comes the ſtatute of 32 *Hen.* 8. *c.* 36. and, taking notice that there had been ſome doubts whether by the ſtatute of 4 *Hen.* 7. fines would bar eſtates tail, for ſettling this point, enacts, "that fines levied ac-"cording to the ſtatute of 4 *Hen.* 7. *c.* 24. ſhall be a good bar of eſtates tail. But in this ſtatute of 32 *Hen.* 8. *c.* 36. there is a proviſo, "that this ſtatute ſhall not extend to intails made by act "of parliament;" ſo that the eſtate of *Earl Charles* being an eſtate tail, made by act of parliament in the fourth year of *James the Firſt*, and not within the ſtatute of 32 *Hen.* 8. *c.* 36. does remain ſtill in being notwithſtanding the fine of *Earl Charles*, unleſs the ſtatute 4 *Hen.* 7. *c.* 24. enables a tenant in tail to bar his iſſues in tail by a fine. And as to THIS FIRST QUESTION I am of opinion, that this ſtatute of 4 *Hen.* 7. *c.* 24. does enable a tenant in tail to bar his iſſue by a fine with proclamations levied according to that ſtatute: I am not ignorant that there has been great variety of opinions concerning this matter; the many books that have been cited by thoſe that have argued on either ſide, ſufficiently teſtify this; and I will not ſay but there is room enough for doubts and difference of opinions concerning this matter, from the penning of that act. It has been made a queſtion in this caſe, whether the iſſue in tail be included in the word "privies;" and ſure methinks they are: there is always a privity of blood between a tenant

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in tail and his iſſue of neceſſity; (*l*) and there is a privity of eſtate that enables the iſſues to bring a writ of error, or a *formedon* in *deſcender*: he muſt make his title by his anceſtor; he is ſubject to his warranty if he has aſſets; all which ſhew him to be privy; and ſo
* [115] are the books, *Dyer*, 3. *Hobart* in *Macwilliams's* * *caſe*, 333. 2 *Inſt.* 516. and many other books: but I do not take the doubt to ariſe merely upon this, whether iſſues in tail may be comprized within the word "privies" in the enacting part of the ſtatute, for the purview of the ſtatute is in general words, *viz.* "and the ſaid proclamations "ſo had and made, the fine to be a final end, and to conclude as well "privies as ſtrangers:" now whether the iſſue be within the word "privies" or not, yet certainly they are within the generality of thoſe words, for they extend to all the king's ſubjects of what condition, quality, age, or ſex ſoever; and all had been bound by it, as it is holden in *Dyer*, 3. in caſe there had been no ſalvos: ſo then the matter of the doubt ariſes upon this, whether the iſſues in tail are not within the benefit of the third ſalvo, of the intereſts of ſuch to whom any right ſhall come after the levying the fine? Before this ſtatute, if tenant in tail had levied a fine, yet upon his death a right had deſcended to his iſſue; and whether that right be ſaved now by this ſalvo, is the queſtion; for if it be ſo, then though he be within the words of the general purview, he will be out of the act: and this I muſt confeſs to be not without ſome difficulty; for there is nothing in the ſalvo which may incline one to extend it to ſtrangers only, and not to privies; and if it were a new caſe it might bear ſome diſpute, whether the iſſue be not within the benefit of that ſalvo? The former ſalvo is, "ſaving to all and every perſon and perſons, "other than the parties to ſuch fine, all ſuch right as they had at the "time of the fine levied;" and this is, "ſaving to all other perſons, "all ſuch right as ſhould accrue after:" the words of the former comprized *privies*, and why they ſhould not here may ſeem a doubt: but it having had ſuch great agitation formerly, and having of late years ſlept, and not been ſtirred, as I know of, till this caſe; and the more and greater authority as they ſeem to me (which I purpoſely omit to mention, becauſe they have been already ſo often and ſo copiouſly cited in this caſe) having been that a fine with proclamations did by that ſtatute of 4 *Hen.* 7. *c.* 24. bar the iſſue in tail, and no judgment, to my knowledge, ever againſt it, I am willing to look
* [116] upon it as a point ſettled, and for many years paſt acquieſced * in, without labouring it further; eſpecially ſince I conſider, that, ſince that the ſtatute of 32 *Hen.* 8. *c.* 36. has eſtabliſhed, "that fines with "proclamations according to the 4 *Hen.* 7. *c.* 24. ſhall be a bar of "eſtates tail:" it is hardly ever like to come in queſtion again, what the effect of 4 *Hen.* 7. *c.* 24. as to this purpoſe was; and I think it not to be material in this caſe, which I take wholly to depend on the ſecond queſtion, *viz.*

(*l*) Co. Lit. 271. 2 Inſt. 516. 8 Co. 42. Sheph. Touch. 20. Cruiſe on Fines, 156.

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THE SECOND QUESTION, Whether the ſtatute of the fourth of *James the Firſt* found in the verdict, has made ſuch an alteration of the original eſtate of this manor given by king *Richard the Third* to *Thomas, Earl of Derby*, as that now, ſince this ſtatute, it ſhall be out of the reſtraint laid upon it by the 34 and 35 *Hen.* 8. *c.* 20. which reſtrains "tenant in tail of the "gift of the crown from alienating the land from his iſſues, ſo long as "the reverſion remains in the crown?" And as to this queſtion, in the firſt place, I muſt acknowledge that I take the eſtates mentioned and limited by that act of 4 *Jac.* in a ſtrict ſenſe and acceptation of law to be new eſtates limited and directed by that act: the eſtates of *Alice* and *Earl William* for their lives, ſeem to me to be new eſtates; the eſtate limited to *James*, the ſon of *Earl William*, and the heirs males of his body, and the eſtates tail to *Earl William*, to the ſeventh ſon ſucceſſively, are all new eſtates; and ſo are all the ſubſequent eſtates limited in that act; otherwiſe *Earl William* would have an eſtate tail, and *James*, nor any of the reſt of them, could not have had any eſtate in this manor in the life of *Earl William*, as my brother DOLBEN well obſerves; and as he likewiſe obſerves, *James* might have entered upon his father's alienation ſince the making of this act, if he had made a feoffment; and *James* ſince this act might have forfeited the manor for treaſon in his father's life time, and his father could not make any ſuch forfeiture: all which would have been otherwiſe if the old eſtate had ſtood as it did before the making this act, without any alteration: and they ſeem to be undeniable arguments that theſe eſtates are new eſtates in the ſtrictneſs of the law. Beſides, *James* and all the ſons of *William*, and thoſe that follow after, take the lands by *purchaſe* ſince the * act; whereas if the act had not been made, they could have taken nothing in the lands but by *deſcent*; and if *James*, or any of his iſſue, ſhould forfeit for treaſon ſince the act, they could forfeit no more than their own eſtates; and the others, to whom remainders are tailed, would have no prejudice by it; but before the act it would have been a forfeiture of the whole eſtate; and if the king ſhould have granted his reverſion ſince the act, *James's* fine, or the fine of any of his iſſues, would ſurely have barred only their own eſtates; and if they had died without iſſue, the remainder men might have then maintained *formedons*; but it muſt have been in *the remainder*, not in *the deſcender*: all which ſeems to me to demonſtrate thoſe eſtates created by the act to be new eſtates. But yet though I take theſe eſtates created by the act to be new eſtates, yet I conceive that *Charles's* fine has not barred his iſſue in this caſe; for I am of opinion that this eſtate limited to *James*, and all other the eſtates tail created by the ſtatute of *king James*, are protected from being barred by the ſtatute of 34 & 35 *Hen.* 8. *c.* 20. ſo that a fine levied by any of thoſe tenants in tail ſhall not bar his iſſue while the king's reverſion is in him. I take it for granted that an alienation by *fine* is as much prohibited by the ſtatute of 34 & 35 *Hen.* 8. *c.* 20. as an alienation by *common recovery*, and that by force of theſe words, "The heir in tail may enter, the ſaid recovery or any other thing or "things, to be had, done or ſuffered by or againſt ſuch tenant in tail

* [117]

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to the contrary notwithſtanding." And accordingly is *Lord Coke* (*m*) and though *Lord Hobart* (*n*) calls it an oblique and indirect ſtrain, as brother MAYNARD objected, yet it has obtained to this time; and it ſeems to have a great foundation in the very act of parliament itſelf; for it is plain, by the preamble of the act, that it was the alienation of the land they intended to hinder, not the manner of the alienation: and it had been to little purpoſe to hinder tenant in tail in that caſe from aliening by *recovery*, if they had left him the power
* [118] to bar his iſſue by a *fine*; and theſe words, * "any other thing or "things," ſhew that they intended not only to hinder recoveries, but any thing elſe that might be made uſe of to bar the iſſue; therefore it ſeems it was wiſely done to extend the ſtatute, as they did, to *fines*. It is true, that only *recoveries* are mentioned in the act, but I think the reaſon of that to be becauſe in all probability *recoveries* were the aſſurances then uſed for the barring intails where the reverſion was in the crown. It was a caſe excepted out of the 32 *Hen.* 8. *c.* 36. and it was at that time queſtioned, whether the ſtatute of 4 *Hen.* 7. *c.* 24. extended to intails or not; but recoveries were by all holden to bar the iſſue in tail, ſo in probability they would rather make uſe of them in ſuch caſe, than to reſt upon *fines*, upon the doubtful interpretation of an act of parliament then controverted; ſo that to me it ſeems the reaſon why they mentioned only *recoveries* in the ſtatute was, becauſe that was the uſual ſecurity in ſuch caſes; but they did it with the addition of "any other thing or things," to ſhew that if uſe were made of any other aſſurance to bar the iſſue, that ſhould be invalid too in ſuch caſe; for the alienation was the thing that they intended to reſtrain. In the next place I lay this down as the ground of my opinion, and as a foundation of all I have to ſay in this caſe, that the crown was intended to have, and in truth had a real benefit and advantage by the ſtatute of 34 *Hen.* 8. *c.* 36. The end of the king's giving eſtates to his ſubjects that have done him great and acceptable ſervices, is partly to reward them and their poſterity, and to oblige the children to follow the example of their anceſtors, when they ſhall be ſenſible how well they have been rewarded, and to encourage others to do the like ſervices, upon hopes of the like rewards: theſe are not ſlight things, but of mighty moment to the crown, and more valuable than the manors they give; for the ſtrength of the crown is much built upon the real ſervices and faithfulneſs of the ſubjects, and their readineſs and willingneſs to ſerve their ſovereign according to their duties. By the preamble of this act it appears, that the kings of this realm had this conſideration in their eye when they gave ſuch eſtates tail to their
* [119] ſubjects; and it appears * alſo by the act, that the makers of the act had it in their eye to give this a continuance and duration according to the king's intention, and for the advantage of the crown, it being as a *quid pro quo* to the king for his liberality: it being a great advantage to a ſovereign oftentimes to part with a little eſtate to purchaſe the hearts and love of his ſubjects. (*o*) Now theſe intentions of the kings in

(*m*) Co. Lit. 372. and in the laſt reſolution in Stafford's caſe, 8 Co. 78.

(*n*) Macwilliams's caſe, Hob. 332.

(*o*) No eſtate tail granted by the crown will fall under the protection of theſe ſtatutes, unleſs the grant appears to have been as a reward for ſervices, Perkins v. Sewell, 1 Bl Rep. 654. 4 Burr. 2223. Cruiſe on Recoveries, 264.

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rewarding their ſubjects would be of little avail if the iſſue might alien their eſtates as ſoon as they had them; the king's bounty would be ſoon forgot when the land was gone, and he would quickly loſe his aim; therefore it was the intereſt of the crown to perpetuate thoſe eſtates that the king gives as much as may be, and to continue them in the family: for the miſchief that the act intended to remedy, appears in the preamble to be, that by ſuch alienations not only the iſſue in tail were deprived of the benefit which by the crown was intended to them in that gift, but that the crown was likewiſe prejudiced thereby, in having that made away and aliened from the family, which by the gift was intended to be and ſhould, and in all reaſon would have been, not only a continual obligation on the family of the donee as long as it ſhould endure, but likewiſe an encouragement and inducement to other families to perform faithful and diligent ſervices to the crown, when they ſee how well others have been rewarded by their ſovereigns for ſuch ſervices. The king could not annex any ſuch reſtraint to his gift of it; the iſſue, but nobody elſe, might be barred by the alienation where the king gave a fee-ſimple conditional, at the common law, though the king could not; and ſince the ſtatute *de donis*, by which *conditional fee-ſimples* are made *intails*, the king's prerogative could not reſtrain the alienation ſo as to bar the iſſue; as appears, *Dyer* 32. But as ſoon as fines were made bars of intails (*p*), the king's donees might bar their iſſues; and ſo would recoveries, though they could not ſtir the king's eſtate: this was miſchievous to the crown; therefore to help this the makers of this act annexed this in nature of a condition or limitation to all the king's grants in tail, that they ſhould not be aliened * by the donee or his iſſues; this was * [120] for the king's advantage, and this the makers of the act ſeem to have in their eye equally, if not more, than the iſſue in tail; for the act ſounds in diſability both to the donees and their iſſues; if the king had parted with his reverſion, they took no care what became of the iſſues: the king had power to take off this reſtraint at pleaſure; but the donees, nor any of their iſſues, could not free themſelves from it by any thing they could do; and it is not any qualification or alteration of the eſtate tail, nor any thing inherent in the eſtate-tail; but if it be inherent in any thing, it is inherent in the king's reverſion.

Theſe things being premiſed, I ſhall go on to ſee how far this caſe is within the letter and meaning of this Act of 34 *Hen.* 8. *c.* 36. The words of the act are, "Whereas the king hath granted, or "otherwiſe provided to his ſubjects manors, *&c.* to them and the "heirs males of their bodies; and whereas ſundry ſuch donees and "their iſſues, have ſuffered feigned recoveries of ſuch manors, "whereof the reverſion is in the king;" and then it provides, "That the iſſue in tail ſhall not be barred, *&c.* but may enter, *&c.*" Now in our caſe this manor was given by king *Richard the Third* to THOMAS *Earl of Derby*, anceſtor of *Earl Charles*, in tail male: *Earl Charles* is the heir male of the body of the donee, and he levies a fine; the reverſion being in the king: ſo here the iſſue in tail levies a fine of a manor of the gift of the crown, the reverſion being ſtill in the crown. Thus far it ſeems to be within the protec-

(*p*) Co. Lit. 372. b.

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tion of the ſtatute; but then it is objected that the old intail that was made to *Earl Thomas*, was by the act of *James the Firſt* altered and made into new eſtates. I take it that by this alteration of the eſtate the king has not loſt the advantage and benefit which the ſtatute 34 Hen. 8. c. 36. gave him, of reſtraining this gift of his from being alienated out of the family: it is obſervable, that all theſe new eſtates put together do but make up the old eſtate-tail; they, taken all together, are neither longer nor ſhorter, broader nor narrower than the old and original eſtate of *Earl Thomas*: none ſhall take by theſe new eſtates but thoſe that ſhould have taken by the old; except *Alice*, [121] and ſuch * as ſhould come under the new created powers of making leaſes, or of jointures; which whether they can make any alteration as to this purpoſe I will examine afterwards: there is not any perſon which ſhould have enjoyed under the firſt gift, but ſhall enjoy it under this new model, and that in the ſame method that they ſhould before, without inverting the order of the ſucceſſion in the leaſt; and they ſhall take the like eſtates, and as beneficially by this model as they ſhould by the firſt gift. They ſhould have had eſtates-tail by the firſt gift; they ſhall have eſtates-tail by this act of parliament; all but *William*, and thoſe others particularly named, who by their own conſent have confined themſelves to eſtates for life in lieu of intails. The firſt gift ſays that *Earl Thomas*, and the heirs males of his body ſhall enjoy the manor: this act of parliament ſays, "that *James* and others" who muſt be iſſues male of the body of *Earl Thomas*, "and the heirs males of their bodies," which muſt be all heirs males of the body of the firſt donee before they can take, "ſhall hold the manor ſucceſſively:" this we call new eſtates, and properly enough according to the acceptation of the law; but it is plain they are the ſame in ſubſtance with the old one; the old eſtates tranſlated into a new mode, which remain the ſame in ſubſtance; and why it ſhould not be under the ſame reſtrictions and qualifications as it had before, I cannot underſtand: I cannot look upon theſe eſtates thus created by the ſtatute of *James the Firſt* as new gifts, but as new modelling and ordering of the old gift; the king's gift ruins them all, and to that it is that the reſtraint of alienation is annexed by that ſtatute of 34 & 35 *Hen.* 8. *c.* 20. Alſo none will deny but this is ſtill a manor given to the *Derby* family by the crown, and therefore the reverſion being ſtill in the crown, I ſee not how it can be alienated: if the king had originally given the manor with ſuch remainders as are created by this act, all theſe eſtates had been within the ſtatute of 35 *Hen.* 8. *c.* 20. LORD COKE makes this his third conſultation upon this ſtatute (*q*), and why, when the act of parliament has diſtributed the old intail, and digeſted it into new eſtates, they ſhould not be within that ſtatute of 34 & 35 *Hen.* 8. *c.* 20. I cannot un- [122] derſtand. *King James*, * at the requeſt of the family gives leave to new-modify this eſtate, keeping it ſtill within the bounds of the family, and this to comply with the peace of the family too, as appears by the very act: now it would be very hard to interpret him out of the benefit and advantage that the ſtatute of 34 *H.* 8.

(*q*) Co. Lit. 378.

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gave him over this eſtate, by any implication not ſo much as hinted at in the act, and that contrary to his intention; for it ſeems plain to me that the king never intended to part with any intereſt or power that he had over the eſtate: this I think any one is warranted to ſay by the proviſo for the king's intereſt; which I cannot agree with my brother DOLBEN, to ſignify nothing: I take it to be very ſignificant; to declare the meaning of the act to be, not to prejudice any power, advantage, or intereſt which the crown had in, or over this eſtate; and I think it would be very hard to ſtrip the king, by a ſtrained interpretation, of this power that he had by 34 & 35 *Hen.* 8. *c.* 20. over this eſtate, to prevent it from being aliened from the family, unleſs there were ſome words in the act to lead particularly to ſuch interpretation: it is conſiderable in this caſe, that the reverſion ſtands ſtill in the crown in the ſame plight as it was at the time of the original gift of *Richard the Third*, not any ways altered or impeached by this ſtatute of *king James*. I do not take the new modelling of the grant of *Richard the Third*, by this ſtatute of *king James*, to be in this reſpect any ways compared to the king's parting with the reverſion out of himſelf; for if the king parts with his reverſion, he implicitly parts with his power of reſtraining the iſſues alienation. The reaſon is plain, becauſe this power of reſtraining is by the ſtatute of 34 & 35 *Hen.* 8. *c.* 20. annexed to the reverſion as it is in the crown for the benefit of the crown; and this power of reſtraining alienations, is not communicable to a ſubject, therefore if the king alien his reverſion, that power of reſtraining alienations cannot paſs with the reverſion, but dies and is extinct; and being once extinguiſhed cannot be revived, though the king ſhould have a re-conveyance of the reverſion: this is evident by *Lord Coke*'s ſecond concluſion upon this ſtatute (*r*). But nothing that the donee or any * of his iſſues can do can extinguiſh this power of reſtraining, though they ſhould all join together; for indeed this power by the ſtatute 34 & 35 *Hen.* 8. *c.* 20. is primarily intended for the benefit of the crown, to continue that obligation and tie that the crown had upon the family by this gift, and the encouragement it would give others to ſerve the crown; but there was a benefit did ſecondarily redound to the iſſue, by having the eſtate continued to them; and this they can by no means ſtrip themſelves of. The power of reſtraining alienation I take to be annexed to the king's reverſion, and not to the donee's eſtate; the changing the reverſion may deſtroy it, but the changing of eſtate cannot, eſpecially ſo long as it remains within the old bounds: again, it is obſervable, that this act of *James the Firſt* is made upon an award made in the family, amongſt themſelves, concerning this manor, (among others) for the determining how and in what manner it might be enjoyed by the reſpective branches of the family, which award needed the confirmation of an act of parliament to make it valid; the king joins in it only to make it an act, and to give it the ſtamp and power of an act of parliament, not to part with any of his intereſts, advantages, and privileges; (this appears plainly by the

* [123]

(*r*) Co. Lit. 372.

proviſo)

MURRY v. EYTON.

proviſo) and the award is that this ſhall be enjoyed, by one in tail, and by another in tail, and by another in tail, as they ſhould have taken by the firſt grant of the king: now ſhall this be expounded to give a liberty for any of the iſſue to alien; which they had not before, nor could have had by any thing he could do, and that in prejudice of the crown; as that it ſeems contrary to the award which was to ſettle it in the family. This is an act that is grounded on the award, and participates of the award thus far, that as the award was within the family and amongſt themſelves, ſo this is an act of parliament made within the family, and none but the family parties to it: ſo as by the authority of *Barrington's caſe* (*s*), it ſhould not have barred the right of a ſtranger, though a ſubject; as if *William* before the award had granted a rent-charge, *Alice* ſhould not have avoided it, though
* [124] there * had been no ſalvo; and ſhall this be taken to bar the king of the power and advantage he had to reſtrain the alienation of the iſſues? I cannot in this reſpect but liken it to the *prior of Caſtle-acre's caſe*, cited in that of *Sir Francis Barrington*, where by an act of parliament, the lands of priors aliens are given to the crown, yet this ſhall not prejudice the rent that the *Prior of Caſtle-acre* had out of a priory alien, though no ſalvo in the act; ſhall a ſubject's right be preſerved without a ſalvo, becauſe it was ſaid the act was between others, *viz.* the prior's aliens, and ſhall not the king's intereſt be preſerved here, where he has a proviſo, and the act made between perſons all of the *Derby* family; and the king no otherwiſe concerned than to conſent that it may be an act of parliament: I think, if there had been no proviſo, this reſtraint of alienation, being for the advantage of the crown, would not have been diſcharged; but being there is ſuch a proviſo, it is much the ſtronger. *Alice*, and the eſtates under the powers can make no alterations; for the ſtatute 34 & 35 *Hen.* 8. *c.* 20. enables the tenant in tail to make leaſes for lives, yet by common experience we find that notwithſtanding ſuch leaſes, the reſtraint of this ſtatute as to the alienation by the donee or his iſſues, by this ſtatute remains; and by this very ſtatute, the power given to ſuch tenants in tail to make leaſes is ſaved, though the alienation of their eſtates is prohibited. The privity that BROTHER GREGORY conceived to be neceſſary in this caſe, I conceive to be nothing; for there is no privity required to make ſuch a reſtraint. If the king procure another for money or otherwiſe, to ſettle an eſtate upon *A. B.* in tail, with the remainder to the king and his heirs and ſucceſſors, there is no more privity than here; and yet no queſtion but the alienation of *A. B.* is reſtrained there by this ſtatute, ſo long as the remainder is in the king; ſo is *Stafford's caſe* (*t*) after the king had made a gift in tail, he grants the eſtate to another in tail in reverſion; yet it was adjudged, that the reſtraint laid upon the firſt tenant in tail by the ſtatute remained, notwithſtanding the king's ſe-
* [125] cond grant; for as long as * any reverſion remained in the king it was that which reſtrained the alienation, and the iſſue ſhould have advantage of it, and ſo ſhould the ſecond tenant in tail; for the king's reverſion protected both. As to BROTHER MAYNARD's *quære* in

(*s*) 8 Co. 138. (*t*) 8 Co. 78.

this

this caſe, who ſhould be donor? it is no matter whether there be any or not: tails may be without donors in ſome caſes; as where the intail is merely and ſolely by act of parliament, unleſs the whole kingdom be donors; and ſo is the poſt-office, if it may properly be ſaid to be within the ſtatute *de donis*, &c., ſettled by act of parliament on *James Duke of York*, and the heirs males of his body: *Huic pater eſt populus; pater eſt huic nullus:* But in this caſe, in *a formedon*, &c. the donee might declare of a gift from the king, I think, and the ſpecial matter ſet all forth will maintain it; as where *a formedon* is brought of lands that are recovered in value, it is uſed to declare upon ſetting it forth as a gift from the firſt donor, and the ſpecial matter will maintain it: and he concluded upon the whole, that judgment ought to be for the plaintiff.

LORD NORTH being made Keeper could not argue it.

PEMBERTON *Chief Juſtice*, however, delivered his opinion by his appointment, that judgment ought to be for the plaintiff upon the latter point, becauſe the new eſtate-tail raiſed by the ſtatute of the fourth of *James the Firſt* ſhall have the ſame protection as the old eſtate had. But for the firſt point he held, that ſince the act 32 *Hen.* 8. *c.* 36. has expounded the ſtatute 4 *Hen.* 7. *c.* 24. to make the fine of tenant in tail to be a bar to his eſtate, it muſt be adjudged to be ſo in all caſes, notwithſtanding the proviſo in that act, 32 *Hen.* 8. *c.* 36.

SIR EDMUND SAUNDERS, who was made Chief Juſtice of the King's Bench this term (*u*), was of opinion alſo with the plaintiff, and would have argued it, but that the cuſtom is, in an Exchequer-chamber caſe, that after it has been once argued by a judge, it is not to be argued by any new judge.

And ſo there were ten opinions with the plaintiff, and only three againſt him, VIZ. DOLBEN, *Juſtice*, GREGORY, *Baron*, and Baron

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MR. POLLEXFEN was likewiſe in his own private thoughts really of opinion with the plaintiff, as I heard * himſelf declare to SIR GEORGE JEFFERYES. * [126]

Judgment for the plaintiff. (*x*)

(*u*) That is Hilary Term, 34 & 35 Car. 2. vide ante; and note, PEMBERTON was the ſame term removed to the court of Common Pleas.

(*x*) See the caſe of Neal on the demiſe of the Duke of Athol v. Wilding, 1 Will. 275. where in an ejectment for an eſtate under this grant from the crown, and on evidence of a common recovery with ſingle voucher ſuffered previous to the 34 & 35 Hen. 8. c. 20. it was held, that the recoveror thereby gained a *baſe fee*, by which the iſſue in tail were completely barred, and the eſtate rendered deſcendable and alienable, until the ancient reverſion in the crown ſhall take place in failure of iſſue male. See alſo Johnſton on the demiſe of the Earl of Angleſea v. Earl Derby, 11 Mod. 304. Perkins v. Sewell. 1 Bl. Rep. 654. and 4 Burr. 2223.

Trinity Term,

The Thirty-ſecond of Charles the Second,

IN

THE KING's BENCH.

Sir WILLIAM SCROGGS, *Knt. Chief Juſtice.*

Sir THOMAS JONES, *Knt.*
Sir WILLIAM DOLBEN, *Knt.*
Sir THOMAS RAYMOND, *Knt.*
} *Juſtices.*

Sir CRESWELL LEVINZ, *Knt. Attorney General.*
Sir FRANCIS WINNINTON, *Knt. Solicitor General.*

The King *againſt* Maſon.

Caſe 102.

INDICTMENT againſt the defendant on the ſtatute 33 *Hen.* 8. *c.* 9. (*a*) for ſhooting in a gun, *quod non habens terras aut tenementa ad valorem nono die Aprilis anno, &c. apud, &c. ſagittavit.*

An indictment on a penal ſtatute muſt ſtate *the day* on which the offence was committed. 1 Show. 48. Salk. 369. 378. Ld. Ray. 582. 10 Mod. 248.

Exception was taken and allowed, for that "he not having," ſhall be intended to relate to the time of the indictment, and not to the time of the fact.

And therefore quaſhed.

(*a*) See 16 Geo. 3. c. 30.

Dickſon *againſt* Thomſon.

Caſe 103.

ASSUMPSIT. The ſtatute of limitations pleaded: replication *quod aſſumpſit infra ſex annos.* Iſſue thereon.

The *confeſſion* or *acknowledgment* of a debt will avoid the ſtatute of limitation.

Ruled by SCROGGS *Chief Juſtice*, upon evidence, and agreed by all the counſel, That *promiſe of payment* within the ſix years, though the debt were contracted long before, will evade the ſtatute of limitations;

DICKSON v. THOMSON.

tions: but *confeſſion*, or only *acknowledgment* (*a*) that he owed the plaintiff ſo much will not do it.

(*a*) At the Lent aſſizes at Exeter, 1771; in an action on a note of hand, dated ſixteen years anterior to the trial, PRICE, *Baron*, ruled, that evidence of the defendant's having *acknowledged* it to be his hand writing was ſufficient to take it out of the ſtatute. MSS. 12 Viner Abr 192. See alſo S. P. Heyling v. Haſtings, Carth. 471. 5 Mod. 425. 12 Mod. 223. Comy. Rep. 54. although the acknowledgment was made after the commencement of the action, Yea v. Fouraker, 2 Burr. 1099, and in the ſlighteſt manner, Quantock v. England, 5 Burr. 2630, as where in an action on a note of hand, the defendant was proved to have ſaid, "though ſix years were paſſed "he could not preſume it was barred," Swain v. Wallinger. Moſel, 57. So the *acknowledgment* of one out of ſeveral *drawers* of a joint and ſeveral promiſſory note given in evidence on a *ſeparate* action againſt any of the others, will take the caſe out of the ſtatute, Whitcomb v. Whiting, Dougl. 653. notis. And if a letter be written by a defendant, who has pleaded the ſtatute of limitations, to the plaintiff's attorney, couched in ambiguous terms, it ſhall be left to the jury whether it amounts to an *acknowledgment* of the debt. Lloyd v. Maund. 2 Term Rep. 760.

Caſe 104. Anonymous.

In ejectment, payment of rent a ſufficient evidence of the plaintiff's title.

IN ejectment, upon evidence in a trial before LORD SCROGGS, it was held, That payment of rent to the leſſor or to any for his uſe, is a ſufficient title for the plaintiff, if the defendant have no title at all but poſſeſſion.

——Cowp. 622. 1 Term Rep. 161. 4 Term Rep. 680. 682.

A fine muſt have the proclamation indorſed, or it is not evidence.

AND HELD ALSO, That a fine with proclamations when given in evidence, ought to have the proclamations indorſed on it; and it is not enough to ſay, that it is *ſecund' formam ſtatut.*

Caſe 105. Edgecomb *againſt* Sparks.

The tools of a cooper, or other mechanic, may be diſtrained for non-payment of the *poors rate.*

THE plaintiff, being a cooper in *Exeter*, brought treſpaſs in the ſheriff's court there, againſt the defendant, being a conſtable, *quare domum fregit* * *et intravit*, and divers goods, *viz.* &c. did take and carry away.

* [127]

Upon not guilty pleaded, the evidence before SIR THOMAS CARY, their *Recorder* was, that the plaintiff conceiving himſelf aggrieved by a rate to the poor of the pariſh where he inhabited, refuſed its payment; whereupon the overſeers, with a conſtable, by a juſtice's warrant, made a diſtreſs, and thereupon took the tools in his ſhop.

I BEING OF COUNSEL *for the plaintiff* urged, that they were not diſtrainable, being the *utenſils of his trade*, and conſequently the inſtruments of his livelihood; and ſo within the rule of the common law; he having other goods at that time in his houſe ſufficient to have anſwered the diſtreſs.

But THE RECORDER over-ruled me, being of opinion that that rule held not in caſe where diſtreſs was given by act of parliament, as for poor's rates, hearth-money, and the like; and that it only extended to diſtreſſes for *rents* and amerciaments.

Quæ

Quære tamen for that matter (*a*).

(*a*) In treſpaſs for levying a diſtreſs for non-payment of poor rates, one queſtion was, Whether *beaſts of the plough* could be taken? and LORD MANSFIELD, in delivering the judgment of the court, ſaid, "The ſolid diſtinction is between thoſe "diſtreſſes which are made under 43 "Eliz. c. 2. and other penal ſtatutes, "where *a ſale* of the goods is directed, and "a diſtreſs at common law, where the goods "taken are to be held by way of *pledge*;" and on this diſtinction it was held, that beaſts of the plough, and all other implements and *utenſils in trade*, though not diſtrainable at common law, are diſtrainable for the poor rates, under the 43 Eliz. c. 2. and ſuch like acts of parliament. Hutchins v. Chambers, 1 Bur. 579. This diſtinction has been adopted in the caſe of diſtreſs for *rent*, where the officers ſeized the wearing apparel of the tenant; and it was objected that ſuch goods, like utenſils in trade, or beaſts of the plough, could not be diſtrained: but LORD KENYON held, that as the ſtatute of 2 Will. & Mary, c. 5. had given the diſtrainer power *to ſell*, the reaſon of the common law, which depended on the goods taken being in the nature of *a pledge*, had vaniſhed, and therefore that the wearing apparel was diſtrainable. Caldwell v. Tayler, Conſt's edit. of Bott's Poor Laws, 1 vol. page 206, note (a). But if *implements of trade*, or *beaſts of the plough*, be in actual uſe at the time, or if there be other ſufficient diſtreſs on the premiſſes, they cannot be diſtrained. Gorton v. Falkner, 4 Term Rep. 565. See alſo Ld. Ray. 386. Co. Lit. 47. a. 3 Bl. Com. 8. 1 Burr. 588. 3 Burr. 1498. 3 Salk. 136. and 4 Term Rep. 569.

Lovett *againſt* Hobbs.

Caſe 106.

A *ſtage coachman* is a common carrier within the cuſtom of the realm, and is liable for the loſs of goods which the paſſengers take with them; for he has the charge of both their *property* and their *perſons*.

Ante 81.
Poſt 327.
1 Roll Abr. 2.
2 Vent. 75.
1 Sid. 36.
Hob. 18.
Ray. 220.
2 Lev. 69.
1 Salk. 282.

CASE. The plaintiff declares, for that *Richard Hobbs*, on the firſt day of November, in the thirty-firſt year of Charles the Second, and long before and after, was, and yet is a common *hackney coachman*, and a common carrier as well of men's perſons, as of their goods and chattels, in his coach from the borough of *Marlborough* to the city of *London*; and thence to *Marlborough*, *pro mercede et ſtipendio*, to be paid for perſons and their goods; and alſo, that all common coachmen and common carriers by the law and *cuſtom of England* (*a*), ought ſafely and ſecurely to keep all paſſengers goods and chattels from loſs; and whereas the plaintiff the day and year aforeſaid, at *Marlborough* aforeſaid, had delivered to the defendant one box, in which were ſeveral goods and chattels of the plaintiff's, *viz. &c.* to be carried from *Marlborough* to the City of *London*, and ſafely to be delivered to the plaintiff there; and the plaintiff in fact ſays, that the defendant afterwards, *viz.* 1 *November* aforeſaid, took his journey towards *London*, and the 2d of *November* performed his journey and came to *London*, and yet notwithſtanding, * the defendant being negligent of his office of a *common coachman* and *common carrier*, did not ſafely and ſecurely carry the ſaid box and goods, and deliver them to the plaintiff; whereby the plaintiff loſt her ſaid goods, to the value of ſixty pounds; and lays it to her damage of one hundred pounds.

* [128]

Upon not guilty pleaded it came to *Saliſbury aſſizes*, before the then MR. JUSTICE JONES, where, upon evidence, the caſe appeared, that the plaintiff was a paſſenger in the defendant's coach, which was

(*a*) Common carriers are liable by the common law, or *general* cuſtom of the realm; and to recite it, ſays Mr. Hargrave, in the declaration, as is ſometimes the practice both with reſpect to innkeepers and carriers, ſeems not only unneceſſary but even rather improper; becauſe it tends to confound the diſtinction between *ſpecial cuſtoms* which ought to be pleaded, and the general cuſtom of the realm, of which the courts are bound to take notice without pleading; accordingly, it ſeems to be admitted, that deſcribing the defendant to be *a common carrier*, without any thing more, is ſufficient. Hob. 18. 1 Sid. 245. Hard. 485. 3 Mod. 225. 1 Wilſ. 281. Co. L.t. 89. note (7).

a ſtage-

LOVETT v. HOBBS.

a ſtage-coach between *London* and *Marlborough*, and the goods carried with her.

Upon which I, BEING OF COUNSEL *with the defendant*, urged, that this action lay not, for that a *common coachman* is but a new invention, and not within the common law or cuſtom of *England* concerning *common carriers:* that this is not for conveyance of goods, but of perſons; and whatſoever goods of paſſengers are by them carried are ſtill in the paſſengers cuſtody, and they remove them to their own chambers at nights in their inns; and if this ſhould hold, where would it end; it might as well be brought for the rings on their fingers, or money in their pockets which highwaymen rob the paſſengers of.

But THE JUDGE was of opinion, that if *a coachman* commonly carry goods, and take money for ſo doing, he will be in the ſame caſe with *a common carrier*, and is *a carrier* for that purpoſe, whether the goods are a paſſenger's or a ſtranger's (*b*): the like of *a waterman* or *Graveſend boat*, which carries both men and goods.

A carrier is not obliged to take more than his uſual weight of goods and number of paſſengers; and therefore if a perſon put a box behind a ſtage coach, and the coachman refuſe to take charge of it, he is not liable if it be loſt.

THEN we were forced to give evidence of our coach's being full; our refuſal to carry them; and that, without our knowledge at firſt, the porter put up the box behind the coach, which, when we perceived, we denied to take the charge of it (*c*).

THE JUDGE agreed this to be a good anſwer; for if an hoſtler refuſe a gueſt, his houſe being full, and yet the party ſay he will ſhift, &c. if he be robbed, the hoſtler is diſcharged (*d*).

This fact being left to the jury, there was a verdict for the deſendant. MR. POLLEXFEN and others for the plaintiff. MR. EYRE and MYSELF for the defendant.

Ante, 81. Poſt, 327. Skin. 625. 3 Wilſ. 429. 1 Com. Dig. 302. 1 Salk. 18. Ld. Raym. 654.

* [129]

* IN THIS CASE it was agreed, That there needs no particular agreement for hire to render *a common carrier* liable, becauſe when there is none, the carrier may have a *quantum meruit* for it.

Quære. If a declaration ſtate the defendant to be a common carrier from A. to C. evidence of his carrying from A. to B. only, is a variance.

There was one exception not obſerved, *viz.* the defendant was alledged to be a common carrier from *Marlborough* to *London*, and he never came ſo far, it was only to *St. James's Market* and no farther, and there he took the goods up when he came towards *Marlborough*, which is a different *terminus ad quem* from what they declared upon, which is, that he did not deliver at *London*; now on the evidence it appeared he never came to *London*, and ſo was not bound thereto; nor ſuch a carrier as they had declared of.

(*b*) But it ſeems that a carrier is not liable on the loſs of *a paſſenger's* goods, unleſs he be paid for the carriage of the goods as well as the conveyance of the paſſenger, Middleton v. Fowler, 1 Salk. 282. Upſhare v. Aidee, Comyn's Rep. 24. Holt 130. Skin. 625. But *Qy.* For *hire* is not the only and principal ground on which the carrier is liable; the great cauſe of the laws charging him being the *public employment* he exerciſes. Co Lit. 89. a. note (b) and (7). Ld. Raym. 917. 1 Salk. 143. 12 Mod. 487. 1 Viner Abr. 219.

(*c*) See 2 Mod. 309. 4 Burr. 2302. 1 Term Rep. 33. 5 Term Rep. 273.

(*d*) White's caſe, Dyer 158. Dr. & St. 138. Fitz. N. B. 14. Spencer's caſe, Dyer 266.

Michaelmas

Michaelmas Term,

The Thirty-ſecond of Charles the Second,

IN

THE KING'S BENCH.

Sir WILLIAM SCROGGS, *Knt. Chief Juſtice.*

Sir WILLIAM DOLBEN, *Knt.*
Sir THOMAS RAYMOND, *Knt.*
Sir THOMAS JONES, *Knt.*
} *Juſtices.*

Sir CRESWELL LEVINZ, *Knt. Attorney General.*

Sir FRANCIS WINNINGTON, *Knt. Solicitor General.*

The King *againſt* Thomas. Caſe 107.

ORDER of ſeſſions upon a *reputed father* of a child.

An order of maintenance to pay ſo much a week "till further order" is bad.

I MOVED to quaſh it, for that the order was, that he ſhould pay ſo much a week "till farther order," which the juſtices had no power, by the ſtatute, to make, for that "further order" may be forty years hence: now after the child's * death or arrival to twenty-one years of age, the *reputed father* is diſcharged.

Poſt, 132. 256.

* [130]

Quaſhed. (a)

(a) See the caſe of the King v. Selbourne, poſt, page 132. and the caſes there referred to.

Caſe 108.

Zinzon *againſt* Talmaſh.

Hilary Term, 31 & 32 *Car.* 2. *Roll* 300.

If a copyhold eſtate be granted to A. for life, remainder to B. for life, remainder to C. where the cuſtom of the manor is, that in an eſtate ſo granted the perſon firſt named may *ſurrender* the eſtate, according to the cuſtom of the manor, into the lord's hands, and thereby deſtroy the remainders, and A. join in a fine *ſur conuſance* with the lord, conveying the eſtate to other perſons, the remainders are not thereby deſtroyed, for as the intereſts of *third perſons* are concerned, *a fine* ſhall not be conſidered *a ſurrender*.

S. C. Pollexf. 561.
S. C. 2 Jones, 142.
S. C. Ray. 402.
Ante, 82.
Poſt, 153.
3 Co. 77.
2 Roll Abr. 496.
Cro. Eliz. 688.

ERROR on a judgment in the Common Pleas in ejectment.

The caſe on a ſpecial verdict was, a copyhold is granted to A. B. and C. ſucceſſively, as named, *ſecundum conſuetudinem, &c.* A cuſtom is found, that if an eſtate be ſo granted, the party that is firſt named and is the firſt taker, may ſurrender the land into the lord's hands, and ſo deſtroy and determine the whole eſtate, &c. A. tenant for life by copy, remainder to B. for life, remainder to C. for life, and in the manor is ſuch a cuſtom as aforeſaid; A. and the lord join in a deed of covenants to levy a fine, and afterwards they levy a fine accordingly to the uſe of other perſons.

The queſtion is whether this be a good ſurrender?

MR. POLLEXFEN. That this is a good cuſtom is no queſtion; for A. is intended the purchaſor, and therefore this cuſtom may be reaſonable enough. But then we muſt enquire what kind of ſurrender, and what act is ſufficient to make a ſurrender within this cuſtom. It is not found that in the ſurrender any eſtate ſhould be expreſſed, but only that the ſurrender ſhould be into the lord's hands; and, in the *firſt inſtitute*, ſurrender ought to be general; ſo here is no particular mode found neceſſary. The words are that "by the cuſtom of the "manor ſuch firſt taker may ſurrender the land, according to the "cuſtom of the manor, into the hands of the lord:" now theſe words "according to the cuſtom" are not material, for what is it to ſurrender according to the cuſtom of the manor? For there are a great many cuſtoms belonging to all manors wherein are copyholds; and amongſt thoſe is a ſurrender from tenant to lord; it is the ſame in all manors, and there is no caſe of any particular manor where a certain mode is required in ſurrendering or giving an eſtate to the lord: if it had been "to another's uſe," then the lord would be only an inſtrument of conveyance, and then all the particular modes * muſt be obſerved, as rod, pen, &c. and there muſt be an entry of it in the rolls; but in this caſe it is only to drown the particular eſtate. Now by the deed and fine there is a ſurrender, and it is a good ſurrender whereſoever there is a conſent that the copyhold eſtates ſhall be drowned and extinct, whether it be expreſſed in words or deeds: a bargain and ſale to the lord is a ſurrender, *Jones*, 141. a parol agreement adjudged a ſurrender, 1 *Leon.* 181. and a freehold eſtate for life may be ſurrendered without deed; as is 1 *Inſt.* 318. *Bro. tit.* "*Surrender*, 35."

* [131]

MAYNARD *Serjeant* for the defendant in the writ of error. If A. had done it by deed, I think that not ſufficient, and here is not ſo much for it is only a covenant; now certainly a covenant is no ſurrender:

render: and for the fine that conveys the land to a third perſon: a leaſe is not a ſurrender according to the cuſtom of the manor, but according to the common law. A. paſſes nothing by the fine; this eſtate cannot paſs by that conveyance, being a copyhold, and it only concludes him by eſtoppel. A cuſtom is always *infra manerium*, and a matter *extra manerium* can never be by the cuſtom, as a cuſtom to have common out of a manor is void. Now it is impoſſible a fine can be ſaid to be a ſurrender *ſecundum conſuetudinem manerii*; and the end of it is, that all perſons may know who is tenant; none but the lord paſſes any thing by his fine: I confeſs a man may ſurrender in any part of the world, but then it is not *ſecundum conſuetudinem*, becauſe the particular eſtates muſt be drowned *ſecundum conſuetudinem*; and this cuſtom muſt be taken ſtrictly, and certainly the firſt taker cannot bar the remainder by deed.

ZINZON v. TALMASH.

THE COURT. If it were but one ſingle eſtate a ſmall matter might ſuffice to throw it into the lord's hands; but here is the intereſt of a third perſon concerned. It is by a cuſtom that this remainder only can be barred, and that cuſtom ought to be ſtrictly purſued, therefore a ſurrender by implication will not ſuffice: and MR. POLLEXFEN's conſtruction would take away the aſſurance of the copyhold titles which is accounted the beſt, becauſe none can * have a title but that which may be ſeen on the court rolls. * [132]

And the judgment was affirmed.

The King *againſt* Selbourne. Caſe 109.

ORDER of ſeſſions for the *maintenance* of *a baſtard child*, naught, becauſe no order firſt made by the two next juſtices of the peace. (*a*)

The ſeſſions cannot make an *order* of maintenance. 1 Salk.

Order to pay fifty pounds, or any ſuch other ſum *in groſs*, is ill; unleſs it be for weeks paſt from the birth of ſuch child, or for the charge of midwifry and other neceſſaries in the woman's labour, which, my LORD HALE held, that the reputed father was liable to; though the words of the ſtatute ſeem only to intend a maintenance from the time of the order; (*b*) but the father is not compellable to give the child a portion, or to put it out apprentice. (*c*)

The reputed father of a baſtard child may be ordered to pay a ſum *in groſs* for money expended in its keep, or for the charges of its delivery. Poſt. 256.

(*a*) By 3 Car. 1. c. 4. ſ. 15. "juſtices "of the peace, in their ſeveral *ſeſſions*, may "do and execute all things concerning that "part of the ſtatute, 18 Eliz. c. 3. which "relates to *baſtard children*, that by juſtices "of the peace in the ſeveral counties are "by that ſtatute limited to be done." Before this ſtatute it was held that the ſeſſions had no authority to meddle in the caſe of baſtardy, until two juſtices had made an order therein, Slater's caſe, Cro. Car. 471. but it is now ſettled that the ſeſſions have in this caſe an *original juriſdiction*. Wood's caſe, 2 Bulſt. 355. Rex v. Clegg, 1 Stra. 475. Rex v. Greaves, Dougl. 632.

(*b*) See Rex v. Sherman, 1 Vent. 210. Rex v. Smith, 1 Bott P. L. 434. pl. 585. Rex v. Odam, 1 Salk. 124. and Rex v. Eve, poſt, 256. Rex v. Moravia, 1 Bott P. L. 437. pl. 596.

(*c*) Rex v. Willey, 1 Bott P. L. 436. pl. 593.

Qu. If an order of maintenance to pay ſo much a week "*till ſuch an age*," be good.
Ante, 129.
Poſt, 258.

It is naught if to pay ſo much a week till ſuch an age, without ſaying "if it live ſo long:"—*Tamen quære* of this, for the law ſeems otherwiſe, becauſe an order, though ſo general, will determine upon the child's death; for its maintenance ceaſing, the weekly payments for its maintenance muſt likewiſe ceaſe. (*d*)

(*d*) But ſee Burwell's caſe, 1 Vent. 48. Rex v. Bacebaker, 2 Salk. 478. Smith's caſe, Sell and Rem, 64. *contra*, and Rex v. Shed, 2 Stra. 788. *accord*. See alſo the 1 vol. Mr. Conſt's edition Bott's Poor Laws, ch. 8. ſect. 8. where all the caſes upon this ſubject are collected.

Caſe 110. Manling *againſt* Smith.

A prohibition *quouſque*, &c. lies for refuſing copy of *articles* as well as copy of libel.

IN caſe of *articles* in THE ARCHES, if a copy of them be denied, a *prohibition* lies, as well as in caſe of *a libel* when a copy of that is denied, (*a*) but it is only *quouſque*, &c.

4 Edw. 4. pl. 37. 1 Vent. 5. 252. Hard. 364. 1 Sid. 403. Ray. 170. Cro. Jac. 37. 6 Mod. 308. Salk. 553.

(*a*) See the ſtatutes 2 Hen. 5. c. 3. and 2 Edw. 6. c. 13.

Caſe 111. Anonymous.

The mis-recital of a ſtatute by the addition of a word is not material, if it do not enlarge the meaning.
Dougl. 94. 194.

ACTION upon the ſtatute of 1 *Rich.* 3. *c.* 3. that none ſhould ſeize felons goods before conviction.

After verdict it was moved in arreſt of judgment, for that the declaration recited the ſtatute and ſaid, "no ſheriff, nor *under ſheriff*, "nor eſcheator, nor any other perſon;" and in the ſtatute *under ſheriffs* are not mentioned. (*a*)

* [133]

Yet held that this does not enlarge the ſtatute, for that it is included in the word "ſheriffs;" and then * it is, "nor any other perſon," and therefore that is well enough.

Money cannot be *demanded*, but may be *granted* by the name of *goods*.

ANOTHER EXCEPTION taken was, for that it ſays "*bona et catalla*," and then alledges "*money and goods*;" whereas *money* is not included under *bona*, *Fitzh. Abr. tit.* "*Brief*," 312.

But it was anſwered, that it is true, *money* cannot be demanded by the name of *bona*, yet it may be granted by that name, for the perſon who has a grant of *bona felon' et fugitivorum*, ſhall without doubt have his ready money, though a declaration for money is "*pro pecuniis numeratis*."

(*a*) *Under ſheriffs* are mentioned in all the printed editions of this ſtatute.

THIRDLY,

THIRDLY, The ſtatute ſays only *bona*, and the declaration is *bona et catalla.*

The miſ-recital of a ſtatute cured by verdict.

Anſwered, that the verdict helps it by giving twenty pounds damages *pro bonis, et reſid'* for the defendant.

Dougl. 97. *notis.*

AGREED, That notwithſtanding a pardon, a man may be ſaid *convict* within this ſtatute.

Action lies on the 1 Rich 3. c. 3. though the *convict* be pardoned.

ANOTHER EXCEPTION was, that it is "*diverſa bona et catalla,*" AND AGREED, that in *treſpaſs* it is naught, otherwiſe in *caſe* or *debt*, with averment that they are the ſame goods, which will be a bar in another action.

A declaration in *caſe* or *debt* is good, if ſufficiently *certain* to *bar* another action for ſame cauſe.

Judgment for the plaintiff.

Aſhurſt *againſt* Mingay and Farrer. Caſe 112.

Hilary Term, 31 & 32 Car. 2. Roll

COVENANT. A. leaſes to two, rendering rent, &c. one leaſes to the other all his part, &c. A. aſſigns his reverſion to B. who accepts the whole rent of the leſſee, to whom, &c.

A. grants a leaſe for years to B. and C. who covenant for themſelves and their aſſigns to pay the rent to A. and his aſſigns according to the reſervation. B. with the conſent of A. aſſigns the remainder of his intereſt in the term to C. A. receives the whole rent from C. and afterwards aſſigns his reverſion to D. D. as aſſignee of the reverſion may maintain covenant againſt B. for rent accrued after the aſſignment of his intereſt in the term to C. for no act of the leſſee can diſcharge him or his aſſigns from the *ſpecial covenant* of which

The queſtion was whether B. may charge the other with covenant?

AGREED BY ALL, that in caſe a leſſee aſſign over his eſtate, and the rent is accepted of the aſſignee, that then the leſſee is not chargeable with *debt* for the rent after the aſſignment.

BUT IT WAS ALSO AGREED, that *covenant* lies againſt ſuch leſſee after ſuch aſſignment and acceptance; for being an expreſs covenant, the acceptance of another will not diſcharge the covenantor,

But here the doubt is concerning the aſſignee of the grantee of the reverſion, if he ſhall have covenant? Now the ſtatute of 32 *Hen.* 8. *c.* "34. ſays that aſſignees of reverſion ſhall and may have covenant, *&c.* "in the ſame manner that the leſſor might have had;" which is as much as if he had been party to the deed, and in caſe of reparations it is ſo. In the caſe of *Bayly v. Ford*, (*a*) it was reſolved, that an * aſſignee of a term ſhall have covenant by way of retainer againſt the aſſignee of the reverſion, and in the caſe of *Batchelor v. Gage*, (*b*) it is reſolved, on a covenant not to erect any building in the garden, that notwithſtanding an aſſignment and acceptance of the rent from the aſſignee, and death of the leſſee, yet it being an expreſs covenant, an action of covenant lies againſt the executor of the leſſee. Now he in reverſion is without doubt as much concerned to have the rent paid, as to have the houſe, &c. repaired.

the aſſignee of the reverſion ſhall have advantage by the 32 Hen. 8. c. 34. ——— S. C. 2 Jones 144. S. C Lilly Ent. 135. Poſt, 200. N. Lut. 97. 211, 212. Cowp. 803.

(*a*) Bayley v. Hughes, Cro. Car. 137. (*b*) Cro. Car. 8. C. Jones, 242.

* [134]

ASHURST v. MINGAY.

SAUNDERS *e contra.* In the *firſt inſtitute* (*b*) where LORD COKE expounds this ſtatute, he ſays it extends not ſo far as the words ſeem to include; for the payment of a ſum in groſs, the delivery of corn or the like, is not within it. Now ſuppoſe the leſſee and another had covenanted to pay rent, it would have been collateral, and the aſſignee could not have taken advantage of it; for as to the third perſon covenanting, the leſſor has it not as a leſſor; now in our caſe the acceptance of *Farrer* for his ſole tenant makes *Mingay's* covenant to be collateral; and *Mingay* is only chargeable with the covenant to the leſſor, for he is now a collateral perſon, and chargeable only with the covenant, and not with the rent: and for his part he ſaid he thought if a releaſe had been of the rent to *Mingay*, after the aſſignment and acceptance, it would have wrought nothing; and there is a great difference between this caſe and that of *Brett v. Cumberland*, (*c*) for there the acceptance was before the grant of the reverſion, and ſo the covenant was ſettled by the acceptance; and he ſues him on the covenant as on a collateral ſecurity, not as tenant.

CURIA. My *Lord Coke* ſays, "collateral things," but MR. SAUNDERS interprets this of "collateral perſons;" now the rent is no collateral thing though the perſon be ſo, for here was really ent due from *Mingay*.

Adjornatur. (*d*)

(*b*) Co. Lit. 215.
(*c*) Cro. Jac. 522. See 2 Bulſt. 282.
(*d*) See the whole of the pleadings in this caſe, Lilly's Ent. 135 to 137, where it is ſaid that the matter was agreed before judgment, but by S. C. 2 Jones, 144. it appears that in Eaſter Term, 33 Car. 2. judgment was given for the plaintiff.

Caſe 113.

* Pilkington *againſt* Peach.

* [135]

Qu. If a *leaſe* of a houſe be made to an *alien artificer*, which is void by the ſtatute 32 Hen. 8. c. 6. whether the leſſor can have an action for the uſe and occupation.

3 Mod. 94.
1 Saund. 6.
1 Sid. 308.
1 Danv. 321.
2 Danv. 247.
9 Mod. 104.
10 Mod. 91. 116.
Ld. Ray. 283. 853.
3 Salk. 29.
1 Bac. Abr. 82.
2 Vin. Abr. 260.

CASE: wherein the plaintiff declares upon a *quantum meruit* for a houſe, and alledges an entry and enjoyment for ſo long a time, &c. Upon *non aſſumpſit* pleaded there is a ſpecial verdict.

It was found that the defendant was an *alien artificer*, and the ſtatute of 32 *Hen.* 8. *c.* 16. *ſ.* 13. which makes leaſes to them void, and finds an indenture of leaſe by the plaintiff to the defendant for the time mentioned in the declaration; and that there was no ſpecial promiſe beſides the indenture of leaſe; *et ſi, &c.*

The queſtion was, whether a *quantum meruit* lies in this caſe?

It was urged, that in caſe a bond be founded on an uſurious contract, which is vacated by the ſtatute, no *quantum meruit* lies, becauſe the very *contract* in ſuch caſe is void. A promiſe in law (*a*) takes place only where there is no actual agreement: in this caſe he is no treſpaſſer, and can be accounted but a *tenant at ſufferance*, and then no *aſſumpſit* will lie, becauſe there is no privity at all. An *aſſumpſit* alſo is a mere perſonal thing, but this favours of the realty.

(*a*) But ſee 6 Mod. 131.

THE

PILKINGTON v. PEACH.

THE COURT. The intent of the ſtatute was, that no *alien artificer* ſhould have a permanent eſtate, and alſo, that they ſhould not exerciſe any trade here, and this ſtatute making void all leaſes of houſes to them, was thought the moſt effectual means, and this *quantum meruit* will evade the ſtatute if good. Yet are there other ways to evade it, as to make an agreement for ſo long as you and I pleaſe, at the rate of twenty pounds *per annum*, and an *aſſumpſit* will lie thereon, or you ſhall have my houſe for ſo long as you and I pleaſe for ſo much as it is worth. Yet it was agreed that *a contract* which amounts to *a leaſe* is void by this ſtatute.

Adjornatur.

There was cited in this caſe by RAYMOND *Juſtice*, the caſe of *Jevan v. Harridge*, where a bond for performance of covenants in ſuch a leaſe was adjudged void, it is in *Sid.* 308. and the caſe is * likewiſe reported in 2 *Keb.* 116. and in 1 *Saund.* 6, 7, *&c.* and agreed by all the court and counſel at the bar to be good law. * [136]

Adjornatur.

Holmes *againſt* Maynell. Caſe 114.

Trinity Term, 31 *Car.* 2. *Roll* 1102.

EJECTMENT. Special verdict. *Iſaac Maynell* deviſes all his lands to *Elizabeth Maynell* and *Anne Maynell* his two daughters and their heirs, *equally to be divided* betwixt them, "and if they "die without iſſue, then to my nephew *Francis Maynell* and the heirs "male of his body, with divers remainders over:" one of the daughters dies without iſſue.

If a teſtator deviſe "*all* his lands to A. and B. his two daughters, and their heirs, equally to be divided betwixt them, and if they die without iſſue, then to his nephew C. and the heirs male of his body;" the daughters have ſeveral eſtates tail by moieties; but on the death of one of them without iſſue, her moiety ſhall not go immediately to the nephew, but ſhall remain with the ſurviving daughter by way of *croſs remainder*.

The queſtion was, whether this remainder to *Francis Maynell* ſhould take effect immediately for a moiety, or ſhould wait till the death of both daughters without iſſue?

MR. FINCH *for the plaintiff.* Theſe words muſt be taken diſtributively, as if two tenants in common join in a grant of a rent, though the words are joint, the grant is double, and they ought to be taken *diſcretivè*; as is the caſe of *Ayler v. Chep.* (*a*) one deviſed his lands to his two ſons, and to the heirs of their two bodies; and ſays that his executors ſhall have his land till they come to their ſeveral ages of twenty-one years; one attains the age of twenty-one years; and it was held, that that ſon might enter, for the words being, "till "they ſhall accompliſh their *ſeveral* ages," I. E. *reddenda ſingula ſingulis*, when either came to the age of twenty-one years, he ſhould have his part: (*b*) and if it ſhould be otherwiſe, then the ſurviving

S. C. 2 Jones, 172. S. C. Ray. 452. S C Pollexf. 425. S. C. Skin. 27. Poſt, 152. Dyer, 303. Cro. Jac. 104. 448 695. Cro. Car. 75. Hob. 33. 3 Leon. 19 2 Barn. 367. 443. 2 Stra. 969. 1 Atk. 579. Cowp. 797.

(*a*) Cro. Jac. 259. S. C. 1 Brownl. (*b*) See Davenport v. Oldis, 1 Atk. 147. Yelv. 183. 1 Bulſt. 42. 1 Eq. Abr. 195. 579.

HOLMES v. MAYNELL.

daughter would have a remainder in the other part by implication; whereas eſtates made by implication are never favoured in law, and never allowed but for neceſſity; as if a term be deviſed to a ſtranger after the death of the deviſor's wife, if there be no more ſhe ſhall have no eſtate, but if it were to executors after his wife's death, there, of a neceſſity, the wife has an eſtate for life, becauſe there is none elſe to enjoy it, and the teſtator plainly ſays, the executors ſhall not have it till after her death; and here is nothing found in this verdict that ſhould induce a belief that the teſtator intended
* [137] any ſuch thing as *croſs remainders:* they have ſeveral * freeholds and ſeveral inheritances; the ſubſequent words therefore ſhould be ſeveral; he has expreſsly given them an *eſtate tail*, and that in ſeveralty, and therefore no eſtate by implication, for the law never creates an eſtate by implication where the party has given an expreſs eſtate: *Clark's caſe*, (*c*) is expreſsly ſo; and 2 *Roll. tit. Remainders*, 416. 4 *Leon.* 14. (*d*)

Vide Poll. Rep. 172.

MR. POLLEXFEN *for the defendant* argued, that he in the remainder cannot take till they die, *i. e.* both: here the firſt words do originally give them a fee; but then come thoſe other words, "and if they die without iſſue then;" The ſole reaſon why this is conſtrued an eſtate tail is, that purſuant to the party's intention he in remainder may be let in, and therefore it will be hard to ſtretch it any further for his advantage who has nothing but by a ſtretch. We muſt never make a diſtribution to deſtroy, but only to ſerve the intention. (*e*) There is a vaſt difference where the deviſe is to three, and where only to two; no *croſs remainder* ſhall be admitted in caſe of three, becauſe it is uncertain to which of the ſurvivors it ſhall go on the death of one. He cited *Gilbert v. Withy*, (*f*) *Corbet's caſe*, (*g*) *Fuller v. Fuller*, (*h*) and the caſe of *Cole v. Leviſton*, where this very point was adjudged by LORD HALE, and this difference allowed good. (*i*)

Vide 2 Cro. 416. Moore, 853. 1 Rol. 833. 835, 836. 1 Mod. 203. 2 Jo. 107. 173.

This caſe was argued again but I heard them not.

But in Michaelmas term following, SIR FRANCIS PEMBERTON being then *Chief Juſtice*, delivered the opinion of the court in theſe words, or to the like effect.—The caſe ariſes only on the clauſe of the will; and the queſtion is, whether *Francis Maynell*, the remainderman, ſhall have any eſtate in part of the land on the deceaſe of one daughter without iſſue, during the life of the other ſiſter? And we are all unanimouſly of opinion with the defendant; for we take it here, that the leſſor of the plaintiff is to have no eſtate till both

(*c*) Dyer, 331. See 2 Joner, 173.
(*d*) See Caubec v. Hill, Stra. 969. B. R. tt. 22. Williams v. Brown, Stra. 996. Pery v. White, Cowp. 777.
(*e*) Rex v. Rumball, Cro. Jac. 448. Counden's caſe, Hob. 33.
(*f*) Cro. Jac. 655. 2 Roll Rep. 281. 2 Eq. Abr. 190.
(*g*) 2 Ander. 134.
(*h*) Cro. Eliz. 422.
(*i*) Mich. Term, 24 Car. 2. 3 Keb. 3. 35. 83. 90. 100. 124. 293. S. C. 2 Keb. 856. S. C. 1 Vent. 224.—But ſee as to this point the authorities cited at the end of the caſe.

daughters

daughters are dead without iſſue; for it being in the caſe of a deviſe, we muſt be ruled and governed by the intention of the party, whether there be any words legally to carry it or not. The caſe of 13 *Hen. 7. pl.* 17. ſeems to make this out very plain, for there a man deviſed his land to his * heir after his wife's deceaſe; and it was held that his wife had an eſtate for her life; this could be but darkly collected from the words, and yet they took his intent and meaning to be ſo. Here is a plain intention that *Francis* ſhall have nothing till both children be dead, and it is ſuch an intention as both nature and prudence directs; a man by nature being to provide for his children before any others. Beſides, any other conſtruction would be a violence to the very words themſelves, for it is "if they "die," *i. e.* "if they both die, &c." The caſe in *Leonard* (*k*) is a caſe in point; and this is very much ſtronger than that; for there was a deviſe of ſeveral parcels of lands to two ſons ſeverally, and then it is, "if any of them die, &c. (*l*) I confeſs it to be an *anonymous caſe*, but I do not find any book to impugn or contradict that judgment. There is the caſe in *Moor's Rep.* 124. and *Higham v. Baker*, *Cro. Eliz.* 16. *Glover v. Latches*, *Frenchan's caſe*, *Dyer*, (*m*) all of the ſame import: I take that of *Moor* and *Crook* to be all one, though in the firſt book it is *anonymous:* they are "to a man and the heirs males of his body, and if he die without iſſue of his body, &c.;" his heir female ſhall not take by this deviſe; and this is plainly according to the intention of the party deviſor; and no way contrary to this judgment, *Dyer* 330. As to the caſe of *Bryon v. Cauzon*, (*n*) there is no colour why our caſe ſhould be affected thereby; and I have heard great opinions againſt the law of that caſe; but take it as you will, there the opinion was that where the party had expreſſed his mind in particular limitations over on condition, there they would not find our remainders by implication, which implies that if there had been no *croſs remainders* expreſſed, there ſhould have been ſome by implication. The caſe of *Johnſon v. Smart*, (*o*) ſeems the ſtrongeſt caſe againſt us; there a deviſe was to two for their lives, remainder to the two ſons equally to be divided, and to their heirs, and each to be the other's heir, and if they die without iſſue, then to remain to a third perſon; it is ſaid there, that on the death of one without iſſue, his part ſhall go to him in remainder. If there were ſuch a caſe I think the law is quite otherwiſe, but I believe he took it at ſecond hand, * for he was ſcarce of age ſufficient to report at that time; and in truth, as I have ſeen, by a manuſcript ſhewn me by my brother DOLBEN, it was the opinion of the court upon evidence in a trial at Common Pleas bar: there was nothing of a deviſe in the caſe; for it was if a copyholder ſhould make a ſurrender to the uſe of A. and B. his two ſons, and if one die without iſſue, the other to be his heir, and if both of them die without iſſue, then to C. in tail; and the court was of opinion, that if A. die without iſſue, B. ſhould be ſeiſed in tail thereof, and that

2 Jo. 172.

* [138]

* [139]

(*k*) 4 Leon. 14.
(*l*) See Coke v. Gerrard, Saund. 185. Sav. Jac. 416. 448.
(*m*) Dyer 330.
(*n*) 2 Roll Rep. 281.
(*o*) 2 Roll Abr. 416.

during

HOLMES v. MAYNELL.

during the life of B. it ſhould not go to the ſtranger. So that this is a very ſtrong caſe for us, and quite miſtaken by *Mr. Rolle*. The caſe of *Gilbert v. Withy*, (*p*) according to the account that DODDRIDGE *Juſtice* gives of it, is by no means to be cited for the plaintiff; two croſs remainders will very well ſtand together but otherwiſe in caſe of three, for that would make ſuch confuſion as the law abhors; and that was the reaſon of the judgment in that caſe, and I take it to be ſound law, (*q*) Theſe are the principal, if not all the caſes that were cited, and I think none of them will impugn our judgment, but it is agreeable to the rules of law, and here is a pregnant intention with the plaintiff: The LORD HALE declared himſelf of this opinion, and took a mighty difference between the caſes of *a deviſe* and of *a conveyance* at law.

Judgment for the defendant.

(*p*) Cro. Jac. 655. S. C. 2 Roll Rep. 281. 1 Eq. Abr. 190.

(*q*) See Lord Camden's obſervations on Dodderidge's opinion, in the caſe of Twiſden v. Lock, Amb. 663. The doctrine that there cannot be croſs remainder created between more than two perſons, ſeems to be exploded, Co. Lit. 195. b. Mr. Hargrave's edit. note (1) Wright v. Cadogan, 6 Brown's P. C. 156. S. C. Cowp. 31. and a diſtinction ſettled that wherever croſs remainders are to be raiſed between *two*, and no more, the *preſumption* is in favour of croſs remainders; but that where they are raiſed between more than two, the preſumption is againſt croſs remainders, though that preſumption may be anſwered by the plain and manifeſt intention of the teſtator, that croſs remainders ſhould be raiſed, Davenport v. Oldis, 1 Atk. 579. Comber v. Hill, 2 Stra. 969. Perry v. White, Cowp. 777. Phippard v. Mansfield, Cowp. 797. Twiſden v. Lock, Ambler, 663. Maarott v. Townley, 1 Vezey, 102. Atherton v. Pye, 4 Term Rep. 713.

Caſe 115. Morton's Caſe.

Payment of the debt and coſts to the ſheriff on executing a *Ca. Sa.* does not diſcharge the judgment.

DEBT on a judgment. The defendant pleads, that the plaintiff had proſecuted a *capias ad ſatisfaciendum* againſt him upon that judgment; that ſuch *capias* was delivered to the ſheriff; that thereupon he had paid the condemnation money to the ſheriff. The plaintiff demurs.

And PER CURIAM, The plea is naught; for he is not bound to pay the money to *the ſheriff*, but to *the party*; and the ſheriff by that writ only had authority to take his *body*, not his *money*. Suppoſe that the ſheriff die or become inſolvent, the plaintiff muſt not loſe his
* [140] debt; otherwiſe * if the money had been paid to the plaintiff's attorney upon record, for that would have been a payment to the plaintiff himſelf, (and by ſome it would be otherwiſe if paid to the ſheriff upon a *fieri facias*).

JUDGMENT was given for the plaintiff in this caſe.

Sir

Sir John Cutler *againſt* Friend. Caſe 116.

CASE in the Court of Common Pleas for ſlander, alledging him to be a juſtice of the peace, and a deputy-lieutenant. The words were, "He is a papiſt and a penſioner."

It is actionable to ſay of a juſtice of peace, and deputy-lieutenant of a county, "he is a papiſt and a penſioner."

Poſt, 250. 3 Mod. 26. 103. 2 Vent. 265. Ray. 483. 3 Lev. 30. Cro. Jac. 484. Skin. 68. 88. 111.

IT WAS MOVED *in arreſt of judgment*, that the words are not actionable; but it was agreed, that to ſay "He is a papiſt convict," is actionable, becauſe he cannot be an executor, &c. and it is actionable though no ſpecial damage be laid; but "papiſt" is not "ſo; and it is clear that "penſioner" is not actionable, unleſs joined "with other heightening words; cited *Cro. Jac.* 484. *Roll.* 1 *Abr.* "50. 1 *Leon.* 335. Papiſt" ſpoken of a biſhop is actionable, becauſe it touches him in his office; but this reaches not the plaintiff in his office. *Knighton*, *Hull*, *Godbolt*, and 2 *Brownl.* 166.

ON THE OTHER SIDE *it was urged* that he might be turned out of his office for being *a papiſt*, or rather it is inconſiſtent with his office; it is alledged that he was at that time a juſtice, and deputy-lieutenant, and ſtood for burgeſs in parliament when the words were ſpoken, and "penſioner" is with an *innuendo*, one that would ſell his vote for money. "Papiſt" as to point of action is as "thief," and though not convicted yet he may be: juſtices of the peace are to prevent the increaſe of papiſts, and to diſarm them; therefore to ſay "he is a papiſt" is a reflection on him in point of his office: things may be actionable at one time that are not at another; as in caſe of waſte of wood, reputed timber in ſome places that is not ſo in another: papiſts are now more dangerous than formerly; the caſe of a biſhop and a juſtice are much the ſame, both being as judges.

LORD NORTH and WYNDHAM held for the plaintiff; the others doubted.

Adjournatur. (*a*)

(*a*) See the caſe of Rae v. Sir Thomas Clarges, 3 Mod. 26. Poſt, 250. where, on a writ of error, it is held actionable to ſay of an Iriſh privy counſellor, a deputy-lieutenant, and member of parliament, "*he is a papiſt.*" So in How v. Prenire, 2 Ld. Ray. 812. to ſay of one who is a juſtice, a deputy-lieutenant, and a candidate for a ſeat in parliament, "*He is a jacobite, and for bringing in the prince of Wales and popery to the deſtroying of the nation.*" S. C. Salk. 694. S. C. 7 Mod. 107. S. C. 1 Viner Abr. 442. And this judgment was affirmed on writ of error to the Houſe of Lords, 1 Brown. P. C. 97. See alſo Peake v. Meller, 3 Mod. 103. Fry v. Crane, 8 Mod. 283. and 1 Com. Dig. 8vo. 257.

The Thirty-ſecond of Charles the Second,

IN

THE COMMON PLEAS.

Sir FRANCIS NORTH, *Knt. Chief Juſtice.*

Sir HUGH WYNDHAM, *Knt.*
Sir JOB CHARLTON, *Knt.*
Sir CRESWELL LEVINZ, *Knt.*
} *Juſtices.*

Sir ROBERT SAWYER, *Knt. Attorney General.*

Sir FRANCIS WINNINGTON, *Knt. Solicitor General.*

Wayte and others *againſt* German.

Caſe 117.

The ſpiritual court ſhall not be *prohibited* from inforcing the payment of a pariſh rate, made by the majority of the pariſhioners in veſtry aſſembled, although made for the rebuilding and enlarging the nave of the church, although it be ſuggeſted that the tax was *unreaſonable*, and the libel only ſtate, that the pariſhioners were *rightly taxed*.——2 Inſt. 489. 2 Roll Abr. 337. Lind. 53. 1 Salk. 165.

PROHIBITION was moved for in the court of Common Pleas: The church of *St. Clement Danes*, in *Weſtminſter*, was ruinous and likely to fall: the *Biſhop of London* gave leave to pluck it down and build a new one. A rate was made accordingly for repairing the body of the church (the ſteeple ſtanding). They ſuggeſt that the rate was for building a new church, and not for repairing an old one; and that the tax was unreaſonable, *viz.* at the rate of ten years to be paid preſently, and that they had not leaſes of their houſes for ſo long a time.

THE FIRST QUESTION was, Whether the pariſh might not be taxed for the rebuilding a new church where the old one ſtood, though the foundation be ſomewhat enlarged, the church being made bigger (*a*).

(*a*) See the ſtatute 13 Edw. 1. *de circum ſpecte agatis*. 5 Co. 9. 2 Inſt 489. F. N. B. 50. 1 Vent. 367. Poph. 197. 1 Mod. 69. 79. 194. 236. 2 Mod. 222. 259. 4 Mod. 148. 5 Mod. 390. Stra. 570. And. 1.

WAYTE v. GERMAN.

THE SECOND QUESTION was, Whether they could tax at the rate of ten years to be paid preſently, when a man has a leaſe but for one year (*b*).

There was *Jefferie's caſe*, 5 *Co.* 66. cited; and that when a tenant covenants to repair a houſe, and pulls it down and builds it up again ſubſtantially, if it could not be otherwiſe repaired, this is no breach, *Luttrell's caſe* (*c*), and *Daniel v. Clerke* (*d*). One had an ancient mill which had a watercourſe to it, which is diverted; the tenant builds a new mill, following the ſtream in the ſame tenement; and held well enough (*e*): ſo a new church in the ſame pariſh (*f*). The ſpiritual court has juriſdiction of the principal matter, and therefore alſo of the acceſſory (*g*).

BALDWIN *e contra* argued, that in caſe of neceſſity the major part of the pariſh ſhall bind the reſt, but that in the libel they do not ſay the *major part* made the rate.

LORD NORTH *Chief Juſtice*. It is ſaid that the pariſh or ſome of them did "rightfully make the tax," and can that be underſtood otherwiſe than of "the major part:" and if but forty of the pariſh appear, the major part may tax the whole pariſh (*h*).

BALDWIN agreed to the caſe of the mill for neceſſity, but here
* [142] the church might have been * built on the ſame foundation (*i*). The pope nor any eccleſiaſtical power has to do with the building of churches, but the king only; and the bringing in parochial churches is not ſo very ancient as is pretended (*k*).

JEFFERIES. A perſon of another pariſh could not have been taxed for the amendment of a church where he was not an inhabitant (*l*). Our caſe, as we lay it in our ſuggeſtion, is, that the ſpiritual court has refuſed to admit our plea, and therefore we hope to have a redreſs here (*m*). They ought to have gone to the king or to have got an act of parliament. We alledge in our ſuggeſtion that the tax was not made by the majority, and we hope your lordſhip will not intend upon ſuch an ambiguity as is in their libel, for that will be certifying of their libel here. The freehold of the church is in *abeyance*, and therefore without the patron as well as ordinary it cannot be enlarged: the church-yard is conſecrated to one purpoſe, and the church to another. 2 *Roll Rep.* 147. 247.

LORD NORTH *Chief Juſtice*. I have only to conſider whether it be within their juriſdiction: if they wrong you, you may appeal.

(*b*) 2 Roll Abr. 289. 5 Co. 66. Cro. Eliz. 659. Hob. 212. Hard. 379. 2 Jones 122. 1 Mod. 194. 261. 5 Mod. 390. 447. 1 Vent. 308. Lutw. 1023. 2 Mod. 8. Fort. 346.
(*c*) 4 Co. 86.
(*d*) Hutton 58.
(*e*) Cro. Jac. 182.
(*f*) Cro. Eliz. 557. Hob. 39. Poph. 172.
(*g*) Poph. 179. 2 Roll Abr. 289. and the caſe of the Chamberlain of London, 5 Co. 62. 3 Leon. 264. 1 Roll Rep. 109. Brownl. 215.
(*h*) See Stoughton v. Reynolds, Fort. 168. Stra. 1045. Caſes T. H. 274.
(*i*) Keilway 189. The Year Book, 1 Hen. 7. pl. 25.
(*k*) Winch. 53. 63.
(*l*) But ſee 2 Roll Abr. 289. Cro. Eliz. 659.
(*m*)

We

We cannot prohibit unleſs they incroach on our juriſdiction: in *Jefferye's caſe* (*n*) it is plainly adjudged that this caſe is within their juriſdiction. I ſuppoſe that before the ſtatute of a juſtice of the peace's charging an hundred upon a robbery, that a majority might have proportioned the charge; certainly a church may be new built that is likely to fall down, and this is quite different from building new churches where were none before, as to build two in a pariſh where was never but one; and the tenant might have provided with his landlord in his contract not to bear the charge of ſuch rates and taxes. It is clearly of ſpiritual juriſdiction.

WYNDHAM *Juſtice.* We muſt ſuppoſe, in matters of their juriſdiction, that they go according to their laws: for the building a new church where there was none before the king muſt agree, &c. (*o*) but not ſo for building a church that is fallen down.

* CHARLTON *Juſtice.* The beſt objection they have is, that the libel doth not ſay abſolutely that the major part agreed to this tax; but nevertheleſs it is of eccleſiaſtical conuſance. * [143]

LEVINZ *Juſtice.* When there was a pretended power of THE POPE in oppoſition to THE KING, it was an objection fit to be made, but now it is the king's eccleſiaſtical law. But he doubted of the libel's not expreſsly declaring the major part's conſent to the tax, and therefore was for having it amended; and then, &c.

NORTH *Chief Juſtice* and WYNDHAM *Juſtice* conceived it well enough, ſince it was ſaid to be *rightfully taxed*, and ſaid, they could not take notice of the forms and modes of allegation uſed in thoſe courts.

And ſo no prohibition.

And I never heard that it was moved in any other court, but that they ſat down ſatisfied and paid the rate. *Sed quære legem.*

(*n*) 5 Co. 66. Cro. Eliz. 659. Hob. 212. See 2 Saund. 423.

(*o*) 3 Inſt. 201. Codex Jur. Eccl. 212.

Michaelmas Term,

The Thirty-ſecond of Charles the Second,

IN

THE KING's BENCH.

Sir WILLIAM SCROGGS, *Knt. Chief Juſtice.*

Sir THOMAS JONES, *Knt.*
Sir WILLIAM DOLBEN, *Knt.* } *Juſtices.*
Sir THOMAS RAYMOND, *Knt.*

Sir ROBERT SAWYER, *Knt. Attorney General.*

Sir FRANCIS WINNINGTON, *Knt. Solicitor General.*

Lee *againſt* Garret.

Caſe 118.

In debt on a bond conditioned to pay £. 500 to the adminiſtrator of the obligee within two months after his death; A PLEA that he was ready to pay it, but that no adminiſtrator was appointed, without ſaying *encore priſt*, is bad.

DEBT upon bond conditioned to pay money to the adminiſtrators of the obligee within two months after his deceaſe. The defendant pleads, that there were no letters of adminiſtration granted in two months and more after the obligee's death; and that he was ready to have paid it, but that there was no adminiſtrator to receive it. The plaintiff demurs for want of an *uncore priſt*.

POLLEXFEN. There needs no tender becauſe it is rendered a thing impoſſible by the act of God, and therefore the tender is excuſed. When the condition is general and without place, we muſt ſeek him if within the four ſeas, but if beyond ſea the forfeiture is ſaved; but yet when he returns the principal is due; but when the act is made impoſſible it is become no ways obligatory, and a tender is executed.

SAUNDERS *è contra*. If it had been a collateral act, and the matter had become impoſſible afterwards, it would have been void, but not ſo where the condition is parcel of the duty contained in the obligation. (*a*) If bond be for payment of money before *Michaelmas* to A. and A. die inteſtate before that time, and no letters * of adminiſtration be granted before that time, the forfeiture is ſaved, yet the debt is not loſt.

S. C. Ray. 416 & N. L. 87. 111. 119.

* [144]

And judgment for the plaintiff.

(*a*) 1 Jones, 171. 471.

Caſe 119. The King *againſt* Curtis, Chriſtian, and others.

A *venire*, though it ſtates the jury to be *honeſt* men of £. 20 *a year*, inſtead of *free* men of £. 4 *a year*, according to 27 Eliz. c. 6. is good.

S. C. Raym. 407.

INDICTMENT for their *information* againſt the *Duke of Buckingham*.

After verdict it was moved in arreſt of judgment,

FIRST, That the *venire* is "*duodecim probos et legales homines*," and the ſtatute is "*liberos et legales*."

SECONDLY, It is, "*et habentes terras et tenementa ad valorem*" twenty pounds a year, whereas the ſtatute is but *quatuor*.

Precedents on the crown-ſide are always *probos et legales*, except ſome few ſince the exception taken. 1 *Roll Abr.* 832. *Cro. Jac.* 672. *Co. Lit.* 155.

ADJUDGED that it is no material variance, and *legales* includes both *liberos* and *probos*: and *viginti* includes *quatuor*; and the ſtatute ſays four pounds a year at the leaſt; ſo that it may be more, and it is the ſubſtance which is regarded by that ſtatute.

JUDGMENT for the king.

The ſtatutes of amendment do not extend to pleas of the crown.

Ante 27.
6 Mod. 269. 271. 281.

It was ſaid by DOLBEN *Juſtice*, and not denied by any of the other judges, That indictments and pleas of the crown-ſide are not within the ſtatute of amendments, for the preamble is "pleas between party "and party."

Caſe 120. Gray *againſt* Dight.

Trinity Term, 29 *Car.* 2. *Roll* 96.

An action on the caſe lies for maliciouſly citing a churchwarden to account in the ſpiritual court, *knowing* that he has accounted before; though nothing enſue but *excommunication*; and the declaration need not ſtate the particulars of the cauſe.

S.C. Raym. 418.
S. C. 2 Jones 132.
Poſt 154. 246.
3 Burr. 1419.
Cro. Car. 291.

ACTION on the caſe by a churchwarden for a malicious proſecution of him in the eccleſiaſtical court, ſetting forth, That the defendant ſummoned him to account, upon which he appears, and being bid by the judge to account, he does ſo; and yet the defendant proſecuted him again, and went and told the judge that he would not account, on which he is excommunicated.

Moved in arreſt of judgment, That this action lies not.

BUT HELD it does lie for a malicious proſecution in the court-chriſtian, *Cro. Car.* 291. 1 *Roll Abr.* 112. *Hob.* 203. *Wild v. Beny. Cro. Jac.* 667. 1 *Roll* 72.

And this was ADJUDGED for the plaintiff, though they did not ſhew the cauſe on which * he was proſecuted, but only to account generally. But held, to cite a churchwarden to account who has ac-

4 Burr. 1974. Dougl. 215. 1 Term Rep. 518. 2 Term Rep. 232. 1 Jo. 312. 1 Co. 63. Cro. Jac. 351. Ceo. Eliz. 838. 4 Term Rep. 247.

counted

counted before is actionable, though he go no further. And reſolved the action lies, though nothing enſued but an *excommunication*, and no *capias*, nor any expreſs damage laid; for this Court will conſider of the conſequences of an excommunication; and an action lies for a malicious proſecution, though the judges proceedings are erroneous, for that is not material in this caſe. GRAY v. DIGHT.

Judgment for the plaintiff by THE WHOLE COURT on a ſolemn debate.

Tomlinſon *againſt* Freeman. Caſe 121.

PROHIBITION granted after ſentence and appeal, it appearing upon the libel itſelf, that the cauſe was out of their juriſdiction (*a*). Prohibition after ſentence.

(*a*) See Anonymous, poſt, 155. and Owen's caſe, poſt, 195. See alſo 2 Inſt. 602. 619. 2 Roll Abr. 318. 1 Sid. 65. Baniſter v. Hopton, 10 Mod. 12. Smith v. Langley, B. R. H. 317. Symes v. Symes, 2 Burr. 813. Full v. Hutchins, Cowp. 424. Blacquiere v. Hawkins, Dougl. 377. Darly v. Cozens, 1 Term Rep. 552.

Jenkes *againſt* Lyon. Caſe 122.

DEBT on a bond. The defendant pleads *privilege* of the Common Pleas as an ATTORNEY there. An attorney cannot plead privilege after imparlance. 4 Term Rep. 227.

The plaintiff demurs, becauſe it was after *imparlance*.

And held BY THE COURT that ſuch plea comes too late after imparlance.—Judgment for the plaintiff.

Anger *againſt* Brown. Caſe 123.

ERROR on a judgment in *Ireland* in prohibition. A *venue* muſt be laid in a declaration in prohibition. S. C. 2 Jones 128. S. C. 1 Vent. 348. 350. S. C. Ray. 387.

The queſtion was, Whether a place need be alledged in the declaration to direct where *a venue* ſhould come?

Said, that precedents had been in multitudes both ways, with it and without it.

But HERE HELD neceſſary becauſe damages were given, and though the prohibition be delivered only to the judge; yet there having been proceedings againſt the party, for proceeding *contra regiam prohibitionem*, they ought to ſhew where the court is held that they proceed in; and when the prohibition was delivered the contempt is * the ground of the damages, and that is wholly uncertain.

* [146]

ADJUDGED that the *venue* is neceſſary to be alledged. And the judgment reverſed PER TOUT LE COURT.

Caſe 124. Sheffield and others *againſt* The Archbiſhop of Canterbury.

The archbiſhop of Canterbury may ſit as judge in the *Court of Arches*, and therefore cannot ſue *there* for books bequeathed to the library at *Lambeth*, although he is in ſuch caſe only a truſtee.

4 Inſt. 337. Skin. 290. 3 Com. Dig. "Courts," (N. 3.) 6 Com. Dig. "Prohibition," (F. 9.)

PROHIBITION moved for to a ſuit of The Archbiſhop's in THE ARCHES, for a legacy of books given to the library at *Lambeth*. Suggeſtion, that the plaintiffs were cited out of the dioceſs, and alſo that he was judge of THE ARCHES, and ſo would be arbitrator in his own cauſe.

MR. NORTH oppoſed the prohibition, becauſe the gift is not for himſelf.

POLLEXFEN. Books are properly the chattels of the archbiſhop, and will not go to the ſucceſſor; though it is to be hoped they will be tranſmitted, yet the legal property is in him, and though ſome *doctor* ſits as judge in THE ARCHES, yet the archbiſhop may ſit there himſelf whenſoever he pleaſes: and the archbiſhop in this caſe has no remedy but a commiſſion of delegates originally; as the archbiſhop of *York*, when he was tranſlated thither, was ſued for dilapidations in his former biſhop's palace, by an original commiſſion of delegates.

And a prohibition was granted in this caſe, and the plaintiff ordered to declare thereon.

Caſe 125. The City of London *againſt* the Unfree Merchants.

In an action by a corporation to recover toll of goods, freemen may be witneſſes for the defendant.

S.C. 1 Vent. 351. S.C. 2 Lev. 231. Bull. N. P. 290. Nelſon's Lutw. 425, 426. 441.

TRIAL at bar touching a cuſtom or duty for goods imported; which was agreed to be payable for goods brought from other ports in *England* to *London*, but denied for goods imported from foreign parts.

A queſtion aroſe, Whether freemen citizens might be witneſſes?

And denied, and a verdict for the defendants; and a *bill of exceptions* on the plaintiff's ſide, for that freemen were denied to be witneſſes.

HELD they might be witneſſes for the defendants, becauſe that is againſt themſelves (*a*); unfreemen that were not traders were allowed likewiſe for the defendant (*b*).

Bill of exceptions lies in the King's Bench on a trial at bar. 2 Inſt. 427. 2 Jones 117. 2 Lev. 237, 238. Skin. 356. 1 Bac. Abr. 326.

Then THE QUESTION was, Whether the * bill of exceptions might be determined before judgment, or whether on a writ of error (*c*). But, leaving that point, THE COURT gave judgment for the defendants according to the verdict: but agreed, that a bill of exceptions lies on a trial in this court, by the ſtatute *Weſtminſter the ſecond*, cap. 31. (*d*)

* [147]

(*a*) See Bent v. Baker, 3 Term Rep. 27.

(*b*) See the caſe of Rex v. Carpenter, Ante 47.

(*c*) 2 Term Rep. 125.

(*d*) See the caſe of Rex v. Smith and others; where it is reſolved, that a bill of exception does not lie in this court on a trial AT BAR. Poſt, 287. But in the caſe of Rex v. Preſton on the Hill, where it was held, that a bill of exceptions will not lie at ſeſſions, on a queſtion reſpecting the removal of a pauper, LORD HARDWICKE conſidered it as a ſettled point, that a bill of exceptions will lie on a trial at bar. Burr. S. C. 81.

Creſley

Creſley *againſt* Darling. Caſe 126.

SCIRE FACIAS againſt bail: The caſe was thus: In a joint action againſt two, the defendant was bail for one of them. Judgment was againſt the principals, and a *ſcire facias* againſt the defendant as bail for one of them; and ſays only, that the party principal for whom the defendant was bail, had not paid the money, &c.

In a *ſcire facias* againſt *one* of two perſons, as the bail of one defendant in a joint action againſt two, an averment that *he* has not paid is ſufficient.

2 Jones, 75. 96. 188.
1 Roll Abr. 336.
2 Leon. 213.
Cro. Eliz. 132.
1 Bac. Abr. 218.
Ld. Raym. 157.

MR. THOMPSON took exception, for that it ought to have been alledged, that *neither one nor the other* of the principals had paid the money, it being a joint debt, the payment of either would have diſcharged the bail.

DOLBEN and RAYMOND *Juſtices*. It is well enough, for his recognizance was to be bail for ſuch one perſon, and they need not aver further than that that perſon has not paid; but if the other had paid it, the bail ought to have pleaded it.

Judgment for the plaintiff. *Niſi, &c.*

Anonymous. Caſe 127.

WHEN a ſtatute requires a thing to be done in *England*, it is ſufficient to alledge it done in the county of *Devon*, without ſaying "in *England*," for the court will intend that, and they do judicially take notice of all the counties of the realm.

If a ſtatute require a thing to be done in *England*, the *venue* may be laid in *any county* in the kingdom.——7 Co. 3. 6 Co. 47. 2 Roll Abr. 688. 1 Wilſ. 136. Comp. 178. 181. 1 Com. Dig. "Action," (N. 10.)

Anonymous.

IN CASE of *cepit et abduxit*, the price and value ought to be alledged by the rule of THE REGISTER, but not ſo in caſe of detention or wrong done to goods.

In treſpaſs for *taking and carrying* away goods, the *value* muſt be ſtated.——5 Co. 34. Allen, 9. 4 Burr. 2455.

Anonymous.

A VENUE may be well enough of *a foreſt*, though it extend into ſeveral vills; in our court we ſay, "*apud foreſtam de L. in Com' præd'.*" (*a.*)

A *venue* may be laid in a *foreſt*.
2 Roll Abr. 617.
Hob. 266.

1 Sid. 88. 326. Lane 33. 2 Lev. 307. 2 Hawk. P. C. ch. 23. ſ. 93. 1 Com. Dig. "Amendment," (H. 2.)

(*a*) See 4 & 5 Ann, c. 16; 3 Geo. 2. c. 25; and 24 Geo. 2. c. 18. ſ. 3.

Anonymous.

IN CASE of a *grand cape* in dower on a writ of error, there are no continuances returned, and they are only entered in THE FILIZER'S ROLL, but for a *petit cape*, there all the proceſs and continuances muſt be entered.

Continuances in *grand* and *petit cape*.
Ante 61.
Poſt 235.

Hilary Term,

The Thirty-ſecond and Thirty-third of Charles the Second,

IN

THE KING's BENCH.

Sir WILLIAM SCROGGS, *Knt. Chief Juſtice.*

Sir THOMAS JONES, *Knt.*
Sir WILLIAM DOLBEN, *Knt.*
Sir THOMAS RAYMOND, *Knt.*
} *Juſtices.*

Sir ROBERT SAWYER, *Knt. Attorney General.*

Sir FRANCIS WINNINGTON, *Knt. Solicitor General.*

Anonymous. Caſe 128.

JEFFERIES *Serjeant*, moved for an *habeas corpus cum cauſa* to the court of *Feverſham*, which is one of the *cinque-ports:* and granted, becauſe the action was there for a duty or cuſtom for fruit imported thither, in which the judges were *quaſi* parties to the ſuit; he cited *Witherley's caſe* (*a*), and the ſame is allowed in caſe of the city of *London*, when they bring debt on a bye-law; and the cauſes being removed, this court orders a trial by a jury of *Middleſex*.

A *habeas corpus cum cauſa*, lies to the courts of the *cinque-ports*, if the judges there are *quaſi* parties to the ſuit.
2 Inſt. 615.
1 Mod. 20.
4 Com. Dig. "Habeas Corpus," (G. 1,)

(*a*) 2 Roll Abr. 69.

Caſe 129.

Oliet *againſt* Beſſey.

An action of falſe impriſonment will not lie againſt the gaoler of a liberty, for detaining a priſoner committed to his cuſtody, under a warrant from the bailiff, although the arreſt was made out of the bailiff's juriſdiction.

S. C. Poſt 204. S. C. 2 Jones 214. S. C. Ray. 421. 467.

TRESPASS againſt the defendants for falſe impriſonment, wherein the caſe was, the plaintiff was taken out of *a liberty*, and carried, by the bailiffs, to the defendant, * who was keeper of the gaol within the liberty, and had no notice of his being taken out of the liberty.

SAUNDERS urged, That treſpaſs lies not againſt the gaoler, though the firſt taking was certainly wrongful, and it is one intire act as to the party plaintiff, and cannot be ſevered, yet when in cuſtody the gaoler has him charged with the action; and it is an eſcape in him to let him go, though wrongfully taken at firſt.

MR. ATTORNEY *è contra*. "No notice" in treſpaſs is no excuſe, as in felony it is; for in treſpaſs a man is bound to take notice whoſe goods he meddles with, and whoſe ground he walks over: here it is but one continued treſpaſs, and the bailiffs and gaoler are all of a gang (*a*); and if notice ſhould be neceſſary it muſt be given by the bailiffs, and not by the plaintiff. The caſe of *Price v. Allington*, *Cro. Eliz.* 918. where a *capias ad ſatisfaciendum* was delivered to the ſheriff, who made a warrant to his bailiffs to do execution; afterwards a *ſuperſedeas* was delivered to the ſheriff, the defendant being bailiff, having no notice of the *ſuperſedeas* takes the party, who eſcapes, and he retakes him; and held that falſe impriſonment would lie, for he being the ſheriff's ſervant, and having time giving him by intendment to have notice from his maſter of the *ſuperſedeas*, he ought at his peril to take notice thereof, and his act afterwards is not excuſeable.

* [149]

Adjournatur. (*b*)

(*a*) See Sanderſon v. Baker, 2 Bl. Rep. 832.

(*b*) This was a writ of error from the court of Common Pleas. The caſe was, a *latitat* againſt *Beſſey*, iſſued at the ſuit of J. S. directed to the ſheriff of Norfolk, who made his warrant to the bailiff of the liberty of the Duke of Norfolk called *Aiſſham*; and the bailiff of the liberty made his warrant to his deputy to arreſt the ſaid *Beſſey*, and the deputy arreſted him at a place out of the liberty, and afterwards carried him into the liberty, and delivered him to *Oliet* the gaoler. The queſtion was, whether this action lay againſt the gaoler? and all the judges of the Common Pleas were of opinion that it did lie; and with their opinion RAYMOND, *Juſtice*, agreed for the reaſons ſtated. S. C. Ray. 469. See alſo 1 Show. 255. But the THREE OTHER JUDGES reſolved, that the gaoler could not be charged, becauſe he could not have *notice* whether the priſoner was legally arreſted, or not. S. C. Ray. 469. and he had done no wrong to the plaintiff, but had only done that which belonged to his office, and his duty did not oblige him to enquire whether the firſt arreſt were tortious or not, and, if he had been informed of it (without being of the covin or practicing therein) he ought nevertheleſs to detain the priſoner, being delivered to him with a good warrant, S. C. 2 Jones, 214. See the caſe of Bodkin v. Powell, that treſpaſs will not lie againſt a pound-keeper, merely for *receiving* cattle, though the taking were *tortious*; for he is bound to keep whatever is brought to him; but if he go beyond his duty, and aſſent to the *tort*, he is then liable, Cowp. 476. See alſo Wall v. Macnamara, 1 Term Rep. 536. Swinton v. Molley, 1 Term Rep. 537.

The King *againſt* Stroude. Caſe 130.

INFORMATION for a riot, for entering with force into the houſe of AN ENVOY, &c. trial at the bar.

An information lies for *riotouſly* entering the houſe of a tenant *at will*, or even *at ſufferance*, as for a *forfeiture* of the term committed by the landlord.

S.C. Trem. 186. Poph. 121. H. P. C. 137. 3 Mod. 141. 5 Mod. 459. 6 Mod. 43. 1 Salk. 374. 1 Hawk. P. C. c. 65. ſ. 7.

The defendant being bailiff of *Weſtminſter*, entered on pretence of a forfeiture by one *Doughty*, who was convicted of murder.

But THE COURT would not admit it in evidence, for were it ſo, they were all of opinion, that let a man's poſſeſſion be rightful or wrongful, a *forcible entry* on the houſe, though with a lawful pretence is a riot, if THE ENVOY were * not lawfully poſſeſſed, much more if THE ENVOY were tenant at will of *Doughty*: ſo if *Doughty* had goods there, he ought to bring trover, &c. though in this caſe of the king an entry for a forfeiture may be by force, yet if the king grant *bona felonum* to another, the grantee cannot enter by force, for it is a perſonal prerogative and not communicable.

RESOLVED thus *per Curiam* on evidence in this cauſe.

* [150]

Benſon *againſt* Strode. Caſe 131.

Trinity Term, 32 Car. 2. Roll 732.

EJECTMENT. Special verdict: the lands in queſtion were parcel of a copyhold manor, grantable for life and in reverſion: the defendant had a grant for life; and the leſſor of the plaintiff had another grant in reverſion for his life, to commence from and after the death, or ſooner determination of his eſtate: the defendant is attainted of murder, and pardoned.

If A. be copyholder for life, with remainder to B. for life, "to commence "from and "after the "death of A. "or other "ſooner deter- "mination of "his eſtate," and A. is *attainted* of high treaſon; the copyhold is forfeited to *the lord*, and he in remainder may enter without preſentment, although the offender be pardoned.

The queſtion was, Whether he in reverſion might enter preſently?

It was argued this term, but I being called out of court, could not hear the arguments.

It was argued again in *Michaelmas Term* following, and then urged, that the pardon could operate nothing in this caſe, for the king could not hold the eſtate; as is *Salberd's caſe* (*a*), on a ſeizure of a copyhold for recuſancy, and the king therefore remits nothing: a bare commiſſion of felony is no forfeiture without an attainder (*b*). So of a conviction before a preſentment of it (*c*). But by the attainder

S. C. Poll. 615. S. C. 2 Jones, 189. S. C. Skin. 8. 29. 1 Bulſt. 13. 1 Leon. 1. 2 Brownl. 217. 2 Vent. 38. 1 Lev. 263. Godb. 267.

(*a*) Owen, 37. See alſo the caſe of Eaſt v. Harding, Owen, 63. Penn v. Merival, Owen, 63. Lady Montague's caſe, Cro. Jac. 301. Mathews v. Whetton, Cro. Car. 233.

(*b*) Jory v. Pawley, Hilary Term, 20 & 21 Car. 2. 1 Lev. 263. S. C. 2 Keb. 451. 466. Borneford v. Packington, 1 Leon. 1; and ſee 2 Hawk. P. C. ch. 49. ſ. 7.

(*c*) See the caſe of Jefferies v. Hicks, 2 Wilſ. 13.

BENSON v. STRODE.

tainder he is become dead in law (*d*), and this is a forfeiture that does not depend upon a cuſtom (*e*), and the defendant being ſo dead, was not able to hold it, and the king cannot take it; ſo that the lord or the grantee of the reverſion or remainder muſt have it; the lord cannot, becauſe this extinguiſhes the copyhold, and therefore the grantee muſt have it immediately. I confeſs in caſe of a forfeiture by cuſtom, the remainder-man cannot enter without a ſpecial cuſtom, for then the lord's entry is ſometimes neceſſary, and other incidents may be neceſſary; but in caſe * the eſtate is determined as in the caſe of *Allen v. Brach* (*f*), and in many other caſes; as if the lord make a leaſe for years to his copyholder, he cannot enter againſt his own leaſe, but the reverſioner muſt: and if in any caſe it be lawful why not in this caſe.

* [151]

SAUNDERS *for the defendant.* The pardon is not material; that comes too late; and yet the grantee cannot enter. Attainder is a royal forfeiture, and not common to every tenure, for the king only has the advantage of it in caſe of *freeholders* being attainted of felony. In the king's caſe it falls not without office; and in caſe of a ſubject an entry muſt be made in lieu of it: how does this differ from the other caſes of a freeholder: there may be a *poſſeſſio fratris* of a copyholder. Cuſtom has ſo fixed and ſettled it that it is almoſt as good as any other eſtate, though at the common law it be only at will: the queſtion is, Of whom this copyhold was held at the time of attainder? it is of the lord of the manor, even after a grant of the reverſion. This grant in reverſion is to commence "after the determination of the former eſtate," and not by the word "Forfeiture;" and till ſuch determination, in this caſe, the lord may, notwithſtanding the forfeiture, diſtrain for his rent and ſervices; and after this forfeiture he has his election whether he will have the tenancy or the ſervices, and the party cannot deprive him of his election: then before the lord's entry the copyhold eſtate is not forfeited, for it is not determined by the forfeiture; and ſo is the caſe of *Mathews v Whellen* (*g*), and *Lady Mountague's caſe* (*h*). Though there be a forfeiture yet there muſt be an entry before the eſtate can be determined, and there is no difference between that caſe and ours: if a grant had been to me for life, remainder to another for life, and I had made a feoffment, the lord muſt have entered to have determined my eſtate, and therefore without his entry the grantee cannot take; as in *Co. Lit.* 169. *Borough Engliſh* land in caſe of conditions, the eldeſt ſon hath the entry and the youngeſt the eſtate.

* [152]

* THE LORD CHIEF JUSTICE. This is not underſtood to be a grant of the reverſion. And yet he doubted whether there have been conſtant entries in ſuch caſes by the lords of manors: the lord does not always make an actual entry, but generally there is a precept to the ſteward to ſeize the land (*i*), and that is a ſign the lord has a

(*d*) 1 Bulſt. 13. 2 Brownl. 217. Godb. 267. 2 Vent. 38.
(*e*) 2 Jones, 151.
(*f*) Winch. 27. S.C. Winch. Ent. 968.
(*g*) Cro. Car. 233.
(*h*) Cro. Jac. 301.
(*i*) 2 Mod.

right,

right, and that is in the nature of an *habere facias poſſeſſionem*, and does not give title but ſuppoſes one; becauſe the copyhold is determined, or rather, becauſe it appears to be determined by the preſentment that is made of ſuch a forfeiture; it is quite different from an entry which veſts an eſtate, and it is the preſentment (if any thing) that ſeems to determine the eſtate, for the precept to ſeize is in nature of an execution.

DOLBEN *Juſtice*. If a copyholder commit waſte, the lord may leaſe without an entry.

THE LORD CHIEF JUSTICE. There needs no entry upon the forfeiture of an eſtate at common law.

And it was ſaid, That the entry is only neceſſary as to the profits; for if a forfeiture be preſented before ſeizure, the lord cannot have treſpaſs for the profits: *(Sea quære de eo)*.

IT WAS ALSO SAID, Suppoſe the tenant had made a feoffment; if the lord had not entered, the eſtate of the feoffee had been good till entry, and why not in this caſe of an attainder: it was anſwered, that the attainder would have been a good plea, in bar to an action brought by the copyholder.

Adjornatur. (*k*)

(*k*) The Court was of opinion, that by the attainder the copyhold eſtate for life was abſolutely determined; and that no preſentment in this caſe was neceſſary. S. C. 2 Jones, 190; and judgment was given for the plaintiff. S. C. Pollexfen, 621.

Brown *againſt* Cutler. Caſe 132.

EJECTMENT. Special verdict: deviſe to his wife during her natural life, if ſhe do not marry, and if ſhe do marry, then preſently to his ſon and his heirs of his body; and if he die without iſſue, then to *J. S.*

On a deviſe "to "his wife for "life, if ſhe do "not marry; "and if ſhe do "marry, then "to his ſon, "and the heirs "of his body," with remainder over; the remainder if not contingent, but veſts in the ſon to take effect in poſſeſſion upon the *death* or *marriage* of his mother.

The queſtion was, Whether the eſtate to the ſon was contingent?

And argued by WINNINGTON for the plaintiff, and SAUNDERS for the defendant.

And now adjudged by THE COURT, That the wife had a widow's eſtate, and the remainder not contingent; for that they * took it plainly to be the intention of the deviſor, that his wife ſhould have it for her life, if the other ſhould have an eſtate tail. *Per* JONES, DOLBEN, and RAYMOND, *Juſtices*. (*a*)

S. C. Raym. 427. Ante, 136. 1 Roll Abr. 839. Moor, 486. Cro. Jac. 696. Jones, 56. 2 Mod. 290. 1 Salk. 226. 2 Peer Wms. 331. 1 Burr. 228.

* [153]

PITT

(*a*) The Court was of opinion, that the wife had an eſtate *durante viduitate*, and that the eſtate veſted in the ſon to take effect in poſſeſſion upon her death or marriage. S. C. Ray. 427.—See the caſe of Dean and Chapter of Weſtminſter, that wherever

Caſe 133. Pitt *againſt* Moore.

A ſurrender by a copyholder to a *diſſeiſor* of the manor does not extinguiſh the copyhold.
S. C. 2 Mod. 287.
S. C. 2 Jones, 153.
S. C. 1 Vent. 359.
S. C. Skin. 28.
S. C. 1 Freem. 245.
Ante, 82.
Dougl. 710.

ERROR on a judgment in ejectment in the court of Common Pleas, where, on a ſpecial verdict, the caſe was, that a biſhop being in the late times diſſeiſed of a manor, a copyholder ſurrenders to the diſſeiſor to diſpoſe of the copyhold as he pleaſes; the biſhop enters; the copyholder brings his ejectment.

Held in the Common Pleas, that the copyhold was not extinguiſhed, and that it was a void ſurrender; otherwiſe if he had ſurrendered to the uſe of a ſtranger who had been accordingly admitted, though by the diſſeiſor.

The caſe was only opened, and the arguing it adjourned till next term. (*a*)

(*a*) *Anne Pitt* was copyholder for life of lands, parcel of the manor of *Granley*, of which manor the *Biſhop of Worceſter* was ſeiſed in right of his biſhoprick. The biſhop, by the cuſtom of the manor, granted the reverſion of theſe lands to *Thornborough* for life. During *Oliver Cromwell's* rebellion, one *Corbet* became *de facto* lord of the manor, and *Thornborough* ſurrendered the lands to him *ut inde facket voluntatem ſuam*. *Anne Pitt* being ſtill living, *Corbet* granted the reverſion of the lands for three lives. After the reſtoration the then *Biſhop of Worceſter* entered into the manor, and granted the reverſion to *Pitt* the above plaintiff in error, upon whom *Thornborough* the grantee of the former Biſhop of Worceſter, after the death of *Anne Pitt*, entered, and made a leaſe to *Moore*. And after argument by POLLEXFEN for the plaintiff, and by MAYNARD *Serjeant* for the defendant, the judgment given in the court of Common Pleas was affirmed, S. C. 2 Jones, 153.

Caſe 134. Anonymous.

To ſay of a *trader* "he is a bankrupt" is actionable, although no ſpecial damage enſue.
1 Roll. Abr. 61.
2 Jones, 140. 156.
Ray. 184. 231.
3 Mod. 112. 155.
1 Lev. 276.
Cro. Car. 472.
Carth. 330.
Cro. Jac. 578.
Palm. 63.
Stra. 762.
Ld. Ray. 1480.

CASE for words, viz. "he is a bankrupt, and has been ſo theſe "ſeveral months:" and lays no particular damage, but only that he was a tradeſman.

After verdict, and on motion in arreſt of judgment; IT WAS HELD, that if a declaration be, that he got his livelihood by buying and ſelling, and do not ſay by what trade, it is ſufficient to maintain an action for being called a bankrupt, 1 *Roll* 46. And though a man aver not in his declaration that he has loſt his credit, or has had any particular damage, yet if he ſhew himſelf to be, and to have been a tradeſman, it is a ſufficient declaration, for the ſlander of bankruptcy, or being a broken tradeſman: if a man keep a ſhop though cloſe, yet he is a trader within the ſtatute of bankrupts.

Judgment for the plaintiff.

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wherever an eſtate is given to a widow for life, provided ſhe do not marry, it ſhall be conſidered merely *in terrorem*, except, as in the above caſe, there be a deviſe over *immediately*, for it is a ſettled principle that limitations in reſtraint of marriage are not to be favoured; and therefore under a deviſe to a wife for life, provided ſhe remain a widow, but in caſe ſhe marries a ſecond huſband, then to J. S. *when he ſhall attain his age of twenty-three years*, the wife has an abſolute eſtate till J. S. is twenty-three, although ſhe marry before, 1 Term Rep. 389.

The

* The King *againſt* the Sheriff of York.

Caſe 135.

*[154]

MANDAMUS ſued by an attorney of that court. And held a good return thereto, that he was not *debito modo electus*, without alledging the ſpecial matter; and ſuch nicety is not obſerved in returns as has been formerly: and this is the beſt way, becauſe it very properly puts the whole proof on the other ſide, as a plea of *nil debet* does.

To a *mandamus* to reſtore, a return that he was not *debito modo electus*, is good.
1 Salk. 434. Fitzg. 195. 1 Show. 253.

5 Mod. 11. 9 Mod. 380. 325. 2 Ld. Ray. 1379. 1405. Carth. 170.

The King *againſt* Selbye.

Caſe 136.

MANDAMUS was prayed to the mayor and burgeſſes of *Maldon*, to make a man free of the corporation, that has ſerved out his time of ſeven years apprenticeſhip there to a freeman.

A *mandamus* lies to admit an apprentice to his freedom.

THE COURT doubted much if it could be granted. But it was ſaid there were ſeveral precedents of it. And therefore time was given to ſearch. (*a*)

(*a*) A *mandamus* was granted to the *mayor of Oxford*, to admit one *Townſend* to his freedom, he having ſerved an apprenticeſhip to a taylor in that city; and the clerk of the crown produced a precedent of *a mandamus* to the mayor of Norwich for the ſame purpoſe, Townſend v. Mayor of Oxford, 1 Sid. 107. although it appeared that he had married within the firſt two years of his time, contrary to the covenant of his indentures, S. C. 1 Lev. 91. for though it be a breach of his covenant, yet as it was waived by his ſerving out his time, he ſhall not be barred of his freedom, S. C. Ray. 69. 92. See Green v. Mayor of Durham, 1 Burr. 127. and now by 12 Geo. 3. c. 21. where any perſon entitled to his freedom ſhall apply to the mayor, &c. to be admitted, giving notice and ſpecifying the nature of his claim, and the mayor, &c. ſhall not admit him within a month afterwards, *a mandamus* ſhall go, and, if the perſon be admitted, the mayor, &c. ſhall pay coſts.

Box *againſt* Taylor.

Caſe 137.

ACTION on the caſe, for a falſe and malicious proſecution of a ſuit in an inferior court, and ſays only, "*abſque cauſa juſta.*"

A declaration for a malicious proſecution, ſtating it to have been *without juſt cauſe*, is bad.
Ante, 144. Poſt, 246. 1 Roll Abr. 111. 1 Salk. 14. 21. 1 Vent. 86. 5 Mod. 394. 405. 6 Mod. 25. 216. 261.

AND HELD naught, becauſe it might be with a *probable cauſe*, and if there were a probable cauſe for the ſuit, then it could not be malicious, and this action will not lie: "*abſque aliqua cauſa*" will do, or "*ſine cauſa juſta vel probabili*," but "*abſque cauſa juſta*" is not good for the reaſon aforeſaid.

And judgment for the defendant. (*a*)

(*a*) See Johnſtone v. Sutton, 1 Term Rep. 493. Morgan v. Hughes, 2 Term Rep. 231.

Anonymous.

Caſe 138.

Anonymous.

The court will grant a *new trial*, when the verdict was obtained by ſurprize.

IF there be a fault in a declaration on which the plaintiff muſt be nonſuit, and the defendant taking notice of it, do prepare no defence for the trial, but depends thereon, and the plaintiff amends * his declaration without rule for ſo doing, and ſo *ſurprizes* the defendant and gets a verdict, this court will ſet ſuch verdict aſide, and will grant a new trial. (*a*)

1 Bl. Rep. 298. 418. 2 Bl. Rep. 802. 955. 1205. 1 Term Rep. 275. 2 Term Rep. 113.

* [155]

(*a*) See Aidy and Land v. Eaſt India Company, 1 Bl. Rep. 298.

Anonymous.

In ſuing an *audita querela* on a releaſe, the releaſe muſt be proved.

UPON the allowance of an *audita querela* ſurmiſing a releaſe, the releaſe ought to be produced under ſeal, and received and approved in court by witneſſes *viva voce*.

Poſt. 240. 1 Salk. 92.

Anonymous.

In debt on a bond for *twinty* pounds, the declaration muſt be *twenty* pounds.

ON DEBT on a bond, if the *obligation* be falſe *Latin*, the *declaration* ought to be good and true *Latin*; as if the obligation be *wiginti*, the declaration ſhould be *viginti*; and then THE COURT is to conſtrue it if it be a variance.

S. P. 10 Co. 133. S. P. 2 Roll. Abr. 147. Cro. Jac. 607. Skin. 310. 1 Salk. 462. Comp.

Caſe 139.

Anonymous.

An apprenticeſhip ſerved out of *England* or *Wales* will exempt from the reſtraint of 5 Eliz. c. 4.

INDICTMENT on the ſtatute 5 *Eliz. c.* 4. *ſ.* 31. for uſing a trade, not having ſerved ſeven years apprenticeſhip in *England* or dominion of *Wales*, HELD naught, becauſe limited to *England* or *Wales* when the ſtatute is general. (*a*)

Poſt, 210.

(*a*) The words of the ſtatute are "that "it ſhall not be lawful to any perſon to ſet "up, occupy, uſe, or exerciſe any craft, "myſtery, or occupation now uſed or oc-"cupied within the realm of *England* or "*Wales*, except he ſhall have been brought "up therein ſeven years at leaſt, as an ap-"prentice." But it has been held that ſerving as an apprentice for ſeven years, though not in *England* or *Wales*, even beyond the ſeas, is ſufficient to exempt the trader from the reſtraints of this ſtatute, Rex v. Fox, 1 Salk. 67. but it ſeems that it muſt be to a trade uſed in *England* or *Wales* on the 12th January 1562, the *day* on which this act paſſed, Rex v. Liſter, Stra. 788. Rex v. Munro, 1 Bar. H. B. 277. See alſo 1 Roll Rep. 10. 1 Vent. 326. 1 Burn Inſt. 89. 1 Bl. Com. 427. and Conſt's edition of Bott's Poor Laws, 1 vol. 525. Co. 537.

Anonymous.

IN CASE one be cited out of the dioceſe, (*a*) no prohibition is to be granted after plea, for thereby the defendant has owned the juriſdiction of the court; and none can be granted after a plea of a general negative, though that court will perhaps admit a new allegation. Agreed by THE WHOLE COURT.

No prohibition ſhall be granted for acting out of the dioceſs after plea pleaded.

Ante, 145, 146.
2 Roll Abr. 319.
Cro. Car. 27. 1 Vent. 61. Carth. 33.

(*a*) See the ſtatute 23 Hen. 8. c. 9.

Memorandum.

IN *Eaſter* week in this vacation, SIR FRANCIS PEMBERTON was made Chief Juſtice of the King's Bench Court in the room of SIR WILLIAM SCROGGS, who was diſplaced.

SIR F. PEMBERTON ſucceeds *Scroggs* as C. J. of King's Bench.

1 Vent. 354.

Eaſter

* Eaſter Term;

The Thirty-third of Charles the Second,

IN

THE KING's BENCH.

Sir FRANCIS PEMBERTON, *Knt. Chief Juſtice.*

Sir THOMAS JONES, *Knt.*
Sir WILLIAM DOLBEN, *Knt.*
Sir THOMAS RAYMOND, *Knt.*
} *Juſtices.*

Sir ROBERT SAWYER, *Knt. Attorney General.*

Sir FRANCIS WINNINGTON, *Knt. Solicitor General.*

Berris *againſt* Bowyer.

Caſe 140.

TRESPASS. Commiſſioners of bankrupts aſſign lands to C. by deed indented; the aſſignee makes a leaſe of part of the lands before inrolment; and then the deed is inrolled.

A leaſe made by an aſſignee of commiſſioners of bankrupts of the bankrupt's land, before the deed of aſſignment is *enrolled*, is void. 2 Jo. 396. S. C. 1 Vent. 360. S. C. 2 Jones 196. S. C. Skin. 30. Poſt. 196.

The queſtion was, If the leaſe be good?

ARGUED, that the deed of aſſignment is good without inrolment, and that in pleading they need only ſhew the aſſignment, and not the inrolment; and this caſe was compared to that of *attornment*, and that the inrolment ſhould have relation, and there were cited the *caſe of bankrupts*, (*a*) *Dimack's caſe*, (*b*) *Hall v. Dewe*, (*c*) and *Bellingham v. Alſop.* (*d*)

Cro. Jac. 52. 408. Cro. Car. 109. Hetley, 80. Hob. 136. Owen, 150. 1 Sid. 310. Godb. 156. Latch. 157. Cooke B. L. 352.

(*a*) 2 Co. 26.
(*b*) Hob. 136.
(*c*) Latch. 157.
(*d*) Cro. Jac. 52.

BERRIS v. BOWYER.

MR. NORTH *è contra.* The caſes of relations in the king's grants are not the ſame with this. Here is not any time limited by the ſtatute (*e*) when the inrolment ſhall be made; and if the eſtate ſhould paſs by the deed, the inrolment may be forty years after; as to the *caſe of bankrupts* in 2 *Co.* 26. that is of goods which are tranſitory, this is of lands in fee. The words of the act are, "lands, tene-"ments, and freehold ſhall be ſold by deed inrolled," and by any other conſtruction this word "inrolled," would be void; beſides, this is a power and authority given to the commiſſioners, and ſuch ought to be ſtrictly purſued, and this will prevent frauds and double ſales
* [157] which * are neceſſary to be avoided in caſes of bankrupts.

MR. HOLT, in Hilary Term following, argued *for the plaintiff* to this effect.—An inrolment is neceſſary, and the law requires it. The ſale is to be by deed inrolled. Before the ſtatute of inrolments, 27 *Hen.* 8. *c.* 16. inrolment was neceſſary where a conveyance was made by, or to the king, and alſo in caſe of a recognizance: now in theſe two caſes inrolment was neceſſary, abſolutely neceſſary; yet when it comes, it takes effect even from the firſt act, and not from the inrolment. (*f*) Now this is by the common law, and why ſhould it not be ſo by act of parliament? It is common to expound ſtatutes by the rules of common law. (*g*) How a bargain and ſale by the ſtatute of bankrupts differs from the common law I know not. (*h*)

MR. SAUNDERS *for the defendants.* At this time the plaintiff's title was not compleat; but ſay the inrolment ſhall have relation to the firſt act; I ſay there is no need or occaſion to make a relation in this caſe; for there is another manner of relation beyond both, *viz.* to the time of the party's becoming a bankrupt, to avoid all meſne conveyances and charges, and to veſt it in the ſame plight in the aſſignee as it was in the bankrupt. The ſtatute ſays "by deed inrolled "in one of the courts of record at *Weſtminſter*," and this inrolment may be ſeven years afterwards, and the ſtatute of bankrupts has not limited any time, ſo that, the parties living, it may be inrolled twenty years after, and therefore relation would be unreaſonable. The caſes at common law make nothing to this; for firſt in that caſe of the king, the thing paſſes by the king's prerogative, and the party intereſted ſealing the deed is all his work, and the laches of the king's officers ſhall not prejudice him, but it ſhall paſs preſently: now none can ſay the commiſſioners have any intereſt, and in *Litt.* 310. grant and attornment are both neceſſary, and nothing paſſes without both;
* [158] the grant * is not compleat without both: then as to the caſe of recognizances, that is by reaſon of the common law, which ſays, that a

(*e*) The inrolment of the deed of aſſignment is directed by the ſtatutes 13 Eliz. c. 7. 7 Jac. 1. c. 15. and 21 Jac. 1. c. 19; and by ſect. 12. of this laſt ſtatute it is enacted, "that the commiſſioners, or the "greater number of them, ſhall have pow-"er, by deed indented, and *inrolled, within "ſix months after the making thereof*, to "ſell and convey, &c.

(*f*) Needle's caſe, Hob. 221. See alſo 2 Inſt. 674. Owen, 149. Cro. Jac. 408.

(*g*) Moor v. Huſſey, Hob. 97, 98. Bk. of Entries, 635.

(*h*) Bellingham v. Alſop, Noy, 86. S. C. 2 Inſt. 675. S. C. 2 And. 160. Mallery v. Jennings, 2 Inſt. 674.

judicial act done by a judge ſhall be good from the time of the act done; and the inrolment is only for the eaſe of the clerks. For the caſe of a bargain and ſale, I am ſure it has been doubted whether a bargainee ſhall be ſuch a tenant as to maintain an action before entry before inrolment: I ſay it has been doubted. The commiſſioners have barely an authority; the bargainee cannot be ſaid to be in by the bankrupt, nor barely by the commiſſioners; whereas in caſe of a will the deviſee comes in by the deviſor, though the executors or truſtees do convey; this rather is like a forfeiture: it was ſaid by all the court, that in the caſe of *Bellinger v. Alſop*, (*i*) the opinion of the two againſt the three has been held the current opinion, although the caſe of *Iſham v. Morris* (*k*) be otherwiſe: I queſtion if a bargain and ſale may not make a good tenant to the *præcipe* before inrolment? And if tenant in tail become a bankrupt, and the commiſſioners aſſign the land by bargain and ſale, and the bargainee ſuffer a recovery, and then there is an inrolment, *quære*, if the recovery be good. (*l*)

It was ſaid by MR. POLLEXFEN, that *a uſe* will not paſs by parol without deed. (*m*)

But PEMBERTON *Chief Juſtice* ſaid, it would be a good chancery uſe or truſt if for money.

Adjornatur.

In the Eaſter Term following it was adjudged by all THE COURT, that inrolment is neceſſary before any thing can paſs by ſuch deed of aſſignment, or bargain and ſale from the commiſſioners. (*n*)

(*i*) Cro. Jac. 52. S. C. Noy, 86. S. C. 2 Inſt. 675. S. C. 2 And. 160.

(*k*) Cro. Car. 110. Hetley, 80.

(*l*) See Moor, 337. 680. Cro. Eliz. 917. 2 Inſt. 671.

(*m*) 2 Inſt. 675. Poph. 48. 1 Leon. 18.

(*n*) See the caſe of Bennet v. Gaudy, Carth. 178. where it appeared by a ſpecial verdict in ejectment brought by aſſignees of commiſſioners of bankrupts, that the demiſe was made before the bargain and ſale inrolled, and held fatal, and not amendable. But ſee S. C. 1 Show. 200. notis.

The Mayor of Exeter *againſt* Starre.

Caſe 141.

DEBT for a fine (*a*) for refuſing to take the oath of office required by the corporation act, 25 *Car.* 2. *c.* 2. being choſen to be an officer. The bye-law was ſixty pounds for the refuſal of the office of ſteward of the city of *Exeter*. The defendant would take the oath of the office, but refuſed the corporation oath againſt the covenant. *

If the ſteward of a city neglect to take the oaths appointed by 25 Car. 2. c. 2. debt will lie againſt him on a *bye law* impoſing a fine on ſuch as ſhall refuſe to take upon them ſuch office.——Poſt, 196. Skin. 514. 1 Mod. 79. 1 Vent. 171. Ray. 212. 374. 2 Saund. 389. Stra. 828.

(*a*) See Shuttleworth v. Gennet, Carth. 90. 3 Mod. 259. City of York v. Toune, 1 Ld. Ray. 502. 5 Mod. 444. Evelyn v. Evelyn, Burr. 1717. Mayor of Exeter v. Tremlet, 2 Wilſ. 95. Whitfield v. Hunt, Dougl. 727. *notis*. Steward v. Baker, 1 Term Rep. 616.

MAYOR OF EXETER v. STARRE.

HELD, that he is punishable for so doing, for it is a refusal of that without which the office is void and cannot be held. The same ruled in the *Sheriff of York's case*, in Trinity Term, 22 *Car.* 2. *Roll* 48. in LORD HALE's time, for refusing the oaths of supremacy and allegiance; although the election be void, and he be now punishable for holding it, yet it is he that has disabled himself.

But afterwards on *nil debet* there was a verdict for plaintiff.

TREMAIN *Serjeant* in Easter Term following took several exceptions.

In debt on a bye law for a fine made in an ancient court, before the mayor, it shall be intended, after verdict, that THE MAYOR was qualified to impose the fine.

FIRST, They say there is an ancient court held before the mayor and bailiffs, &c. and they have not averred that before their charter it was their usage to swear the mayor and bailiffs in that court; for the charter is a charter of confirmation, and says, "*secundum laudabilem* "*consuetudinem.*" But it was answered, that as to this THE COURT would so intend it now. (*b*)

In what manner debt on a bye-law for a fine must shew the title to the fine.

SECONDLY, That they lay no title to the fine in the corporation, for if the king grant them not the fine, but only power to fine, this will not entitle them to the fine.

But it was answered, there was enough expressed to shew the title to the fine; they say that they have power to convict till he do pay the fine to the use of the corporation, which shews the fine was to be to their use, though the commitment be illegal. The king's patent is never reckoned naught for a false suggestion, when he parts from nothing; and although perhaps it may be so if the king bring a *scire facias*, yet a defendant in debt on a bye law shall not take advantage thereof. In case a man has a grant of *bona et catalla felonum* (*c*) upon the consideration of money paid, and the patentee has occasion to bring *detinue* for such goods, he need not allege that he has paid the money into THE EXCHEQUER.

Judgment for plaintiff.

(*b*) And see Milward v. Thatcher, that on writ of error the question whether the judges below were properly qualified cannot be entered into; it is sufficient they were judges *de facto* in a court having jurisdiction of the subject matter, 2 Term Rep. 81.

(*c*) Rex v. Sutton, 1 Saund. 275.

Case 142.

Walkin *against* Osborne.

Q. At what time an *appellant* must find pledges to prosecute the appeal. S. C. 2 Jones, 154. 7 Co. 9.

APPEAL of felony. Urged that pledges may be put in any time before judgment; where an original is, the pledges are filed or indorsed on the back * of the writ, and sometimes mentioned in the body of the writ; but whether the party be in custody or not, he ought to find pledges to secure the king of his amerciament. AND HELD, that in appeals pledges ought to be found before any answer by the appellee. (*a*)

* [160]

(*a*) S. C. 2 Jones, 154. under the ... of Blenkarne v. Osbourne, says, that ... resolved on argument, that pledges ... found at any time before judgment. But see Raffil's Ent. 46. Wilson v. Lee, 4 Mod. 287. Cutts v. Bambridge, 2 Stra. 834.

The

The King *againſt* Forbis. Caſe 143.

INDICTMENT for not coming to church, taken at a ſeſſions held the thirteenth of *January* in the thirty-ſecond year of *Charles the Second*, for that the defendant, being of ſuch an age, on the firſt of *January* laſt paſt, and for ſix months after forbore to come to any church or chapel, &c.

An indictment found on 13th *January*, charging that the defendant, from 1ſt *January laſt paſt*, abſented himſelf from church for *ſix months*, is good; for the words "*laſt paſt*" ſhall refer to the *month* and not to the *day*.
S. C. Ray. 433.
Poſt, 205, 206.
2 Roll Abr. 520.
3 Term Rep. 623.

And upon motion to quaſh it, was held PER CURIAM that the firſt of *January* laſt paſt, ſhall be intended to be the *month* laſt paſt, and not the *day*: and though a bond dated the fifth of *March*, conditioned for payment of money the twenty-fifth of *March* next, ſhall refer to *the day* and not *the month*; yet ſuch a conſtruction ſhall never be made, to loſe a debt, deſtroy an indictment, or vacate a judgment, but only when it is in maintenance of them. (*a*)

Hob. 139. Dougl. 465.

(*a*) Sir Thomas Raymond ſays that this fault was held ſufficient to have quaſhed the indictment; for that the defendant was charged with having abſented himſelf *for ſix months*, and it appeared upon the record that he had only abſented himſelf *thirteen days*; but that he was left to have his remedy in THE EXCHEQUER, becauſe he had not conformed according to the proviſion of 3 Jac. 1. c. 4.

Shelden *againſt* Hentley. Caſe 144.

DECLARATION on a note under ſeal, whereby the defendant promiſed to pay to the bearer thereof upon delivery of the note a hundred pounds, and avers that it was delivered to him by the bearer thereof, and that he was ſo.

Qu. If an action can be maintained on A NOTE under *ſeal*, by which the defendant promiſes to pay *the bearer* £.100 by an averment that it was delivered to the plaintiff by *the bearer*.
Poſt, 235.
Perkins, 119.
Yelv. 194.
2 Roll Abr. 146.
2 Stra. 945.

SAUNDERS *for the plaintiff*. There being an averment it is ſufficiently certain, and not an *individuum vagum*: a ſpecialty need not name the very name of the perſon *ſi conſtat de perſona* at the time of the delivery; ſo that it is no more than to be bound to the church-wardens of ſuch a pariſh, which in my LORD HALE's time was adjudged good.

JONES *Juſtice*. At the time of the ſealing whoſe deed was it, and to whoſe uſe?

SAUNDERS anſwered, that it was no deed till the delivery, and then it was the plaintiff's.

* MR. HOLT *è contra*. It is not averred that it was ſealed to the plaintiff's uſe. No perſon can take by deed that falls not under a deſcription before the making of the deed; as a baſtard that has not gained a name by reputation cannot take by the name of ſon. Here is no perſon aſſigned till the delivery. * [161]

SHELDEN & HENTLEY.

THE COURT. The person seems sufficiently described at the time that it is made a deed, which is at its delivery. Suppose a bond were now made to THE LORD MAYOR of *London*, and the party seals it, and after this man's mayoralty is out, he delivers the bond to the subsequent mayor, this is good; *traditio facit chartam loqui*; and by the delivery he expounds the person before meant; as when a merchant promises to pay to "*the bearer*" of the note, any one that brings the note shall be paid.

See Cro. Jac. 261. and Perkins, 118.

But JONES *Justice* said, That it was the custom of merchants that made that good (*a*), and he put this case, that if a man be bound to pay to *(blank)* and seal it, and afterwards a name is put in, this is not a good bond.

Adjournatur.

(*a*) See Hinton's case, Post, 235.

Case 145. Chivers Sheriff of Wilts *against* Fenn and others.

Warrant of the principal for appearance, extends not to the bail.

Keb. 593. 2 Bac. Abr. 187.

DEBT on a bail-bond. The principal gives a warrant of attorney to appear for himself to *Mr. Twyford*, and his bail being his neighbours, he orders him to appear for them too, which *Twyford* does; and, for want of a plea, judgment is had against all three.

But upon motion judgment was set aside as to the bail, the principal's order not being a warrant to appear for more than himself; but it being by ignorance of the law, and not a wilful act, the judges on motion discharged the attorney as to any contempt.

Case 146. Anonymous.

If a person has a *lien* on goods, a demand and refusal to deliver them is not evidence of a conversion.

TROVER and conversion for a horse in an inn-keeper's hands.

Denial to deliver him is no conversion, nor evidence of a conversion, unless the plaintiff * tender in particular what the horse has eat out, and the jury is to judge if sufficient.

Post, 179. 1 Roll Abr. 5. 10 Co. 56. Cro. Eliz. 495. 2 Mod. 245. Gilb. L. E. 258. Ld. Ray. 868. 4 Term Rep. 260.

Ruled so on evidence *coram* DOMINO NORTH (*a*).

* [162]

(*a*) That an *innkeeper* hath a right to detain a horse left with him till paid for his keeping, Robinson v. Walter, 3 Bulst. 268. York v. Grindstone, Salk. 388. Jones v. Pearle, 1 Stra. 557. Chapman v. Allen, Cro. Car. 271. Linton v. Cook, Bull. N. P. 45; and that demand and refusal of a person having *a lien* is not evidence of conversion. See Mires v. Solebay, 2 Mod. 242. 244. Harford v. Jones, 2 Salk. 654. and Put v. Rawstern, 3 Mod. 2. Skin v. Upshaw, 2 Ld. Ray. 752. *accord.* See also 2 Roll Abr. 92. Cro. Car. 271. Burr. 2826. Bull. N. P. 44.

Trinity Term,

The Thirty-third of Charles the Second,

IN

THE KING's BENCH.

Sir FRANCIS PEMBERTON, *Knt. Chief Juſtice.*

Sir THOMAS JONES, *Knt.*
Sir WILLIAM DOLBEN, *Knt.* } *Juſtices.*
Sir THOMAS RAYMOND, *Knt.*

Sir ROBERT SAWYER, *Knt. Attorney General.*

Sir FRANCIS WINNINGTON, *Knt. Solicitor General.*

Cockman *againſt* Farrer.

Caſe 147.

On a writ of error to reverſe a fine, the defendant cannot plead that very fine, and non-claim in bar.

S. C. 2 Jones 181.

WRIT OF ERROR to reverſe *a fine*. The defendant pleads thereto that the fine was lawful, and five years paſt, and non-claim.

Argued not good, for that it is the ſame with a writ of error to reverſe an attainder or outlawry, and the very ſuppoſition of the writ is, that there was no lawful fine. (*a*)

S. C. Raym. 461. S. C. Skin. 13. 1 And. 172. Co. Lit. 384.

(*a*) The Court were of opinion, that if there had been a *ſubſequent fine*, and five years with non-claim had paſſed, it would have barred a writ of error to reverſe the *precedent fine*, S. C. Skin. 14; but that to plead *the very fine* endeavoured to be reverſed in bar to the writ of error, was contrary to the eſtabliſhed maxim, *non poteſt adduci exceptio ejuſdem rei cujus petitur diſſolutio*, S. C. Raym. 462. The error aſſigned by the plaintiff was, that the conuſor, after the conuſance by *dedimus poteſtatem*, and before the return of the writ of conuſance, died; and for this reaſon the fine was reverſed, S. C. Jones, 183.

Caſe 148. Anonymous.

Latin. INSIMUL COMPUTASSET. It was ſaid, *inventus fuiſſet* inſtead of *fuit*; and URGED, in arreſt of judgment, that *fuiſſet* was nonſenſe; YET HELD good: otherwiſe if it had been *inventus erit.*

Caſe 149. Anonymous.

The court of King's Bench may, on motion, and without a writ of error, quaſh ſummary convictions on penal ſtatutes. Ld. Ray. 581. 1 Burr. 613. 3 Burr. 2281. 1 Term Rep. 18.

MOTION was to quaſh a conviction for hunting, within the late ſtatute.

And thereupon it was queſtioned, whether it might be quaſhed without a writ of * error: *Roll* ſays (*a*), if a man be convicted on the ſtatute 7 *Jac. c.* by two juſtices, for killing of partridges with nets, on proof or confeſſion without indictment, ſuch judgment or conviction may be reverſed without a writ of error, being removed into the King's Bench by *certiorari.*

* [163]

And it was ſaid PER CURIAM, That convictions for not repairing of an highway are made ſo fooliſhly that they are not judgments; and this court hath quaſhed them without any writ of error.

(*a*) Berrie's caſe, 1 Roll Abr. 743. pl. 11.

Caſe 150. Anonymous.

An inventory though not exhibited by the adminiſtrator, but taken by commiſſioners, is good evidence on an iſſue, *devaſtavit*, &c.

UPON the trial of a *devaſtavit vel non*, &c. LORD PEMBERTON allowed for evidence an inventory, though not exhibited by the party defendant, but by commiſſioners on a commiſſion out of the ſpiritual court, &c; and he ſaid likewiſe, that if the defendant would not, or did not exhibit an inventory, it ſhould be taken *pro confeſſo* that he had aſſets.

Anonymous.

The record muſt be produced before a witneſs can teſtify what paſſed at the trial.

PER CURIAM, If a witneſs be to teſtify what another ſaid at a former trial upon his oath that is now dead, the record of that trial muſt be produced, or elſe ſuch evidence is not to be admitted.

Anonymous,

Anonymous.

BY MR. POLLEXFEN. In real actions, as dower or the like, where infancy is in iſſue, it ſhall be tried where the land lies, (*a*) but in perſonal actions, where the action is brought.

Infancy in dower ſhall be tried where the land lies.

(*a*) But ſee Morgan v. Vaughan, Poſt, 168.

Fitzharris's Caſe.

Caſe 151.

THIS term *Fitz Harris* was tried for treaſon; his plea of impeachment in the houſe of lords being over-ruled the laſt term. (*a*)

An *impeachment* depending cannot be pleaded to an *indictment* for the ſame crime.——————Foſter, 105, 106. 3 Burr. 1368.

(*a*) An *impeachment* for high treaſon was inſtituted againſt *Fitzharris* by the houſe of commons. A bill of *indictment* was alſo, and at the ſame time, preferred againſt him; but the grand jury conceiving that they could not receive the bill while the impeachment was pending againſt the indictee, the queſtion was referred to THE TWELVE JUDGES, who were unanimouſly of opinion that the grand jury ought not to take notice of the tranſaction of the houſe of commons, and therefore ought to hear the evidence upon the bill. The grand jury returned a true bill, upon which *Fitzharris*, after counſel aſſigned, pleaded that he ought not to be compelled to anſwer to the indictment, becauſe he was impeached in parliament, and that the ſaid impeachment was then pending, and concluded it to the juriſdiction of the court of King's Beach. To this plea the Attorney General *demurred*, and the priſoner joined in demurrer. But, after argument, the plea was adjudged inſufficient. See the arguments 3d vol. of Mr. Hargrave's edit. of State Trials, 241 to 261. See alſo S. C. 1 Vent. 354.

The Thirty-third of Charles the Second,

IN

THE KING's BENCH.

Sir FRANCIS PEMBERTON, *Knt. Chief Juſtice.*

Sir THOMAS JONES, *Knt.*
Sir WILLIAM DOLBEN, *Knt.*
Sir THOMAS RAYMOND, *Knt.*
} *Juſtices.*

Sir ROBERT SAWYER, *Knt. Attorney General.*

Sir FRANCIS WINNINGTON, *Knt. Solicitor General.*

Dare and Chaſe *againſt* Chaſe.

Caſe 152.

DEBT on a bond. The condition was to perform the award of two, if made on the twenty-firſt of *March*, and for want of ſuch to obſerve and obey the award of *an umpire*, ſo it be made on or before the twenty-ſecond of *March*; and the umpire made his award on the twenty-firſt of *March*. Verdict for the plaintiff.

On a ſubmiſſion to arbitration, ſo as the *award* be made on the 21 *March*, or the *umpirage* on or *before* 22 *March*, an *umpirage* made on the 21 *March* is good, if the arbitrators made no award.

TREMAIN moved in arreſt of judgment, for that here may be two awards: and it is a concurrent authority.

ANSWERED, That in the pleadings it appears the arbitrators made none.

S. C. 2 Jones, 167.
Ante, 61.
1 Mod. 275.
2 Vern. 100.
Kyd on Awards, 48. 117.

And PER CURIAM, What damage if both ſhould award? The arbitrators

DARE v. CHASE.

trators ſhall be firſt preferred. (*a*) There was cited the caſe of 1 *Roll Abr.* (*b*) 262. *Barnard v. King*, (*c*) *Ruſh v. Crab*, (*d*) *Copping v. Harnard.* (*e*)

An award of releaſes to the day of *the award*, inſtead of the day of *the ſubmiſſion*, is bad.——10 Co. 131. Golſb. 91. 6 Mod. 232. 2 Mod. 309. 1 Roll Abr. 243. 3 Lev. 188. Cro. Jac. 352. 1 Salk. 74.

ANOTHER EXCEPTION was moved, that releaſes are awarded to be made to the day of the award, which exceeds the ſubmiſſion. JUDGMENT ſtayed till moved on the other ſide (*f*): the caſe of *Kynaſton v. Jones*, *Allen*, 82. was cited.

Allen's Reports not correctly publiſhed.

MR. JUSTICE DOLBEN thereupon took occaſion to ſay, *the publiſher* had much wronged *the author*, for that he had the original manuſcript, and had compared them, and found it to be miſtaken in ſeveral caſes, even as to the very reſolutions of the court.

Previous to the ſtatute 4 Geo. 2. c. 26. it was error to plead an award in Engliſh.——3 Bl. Com. 322.

Agreed PER CURIAM, that an award ought not to be pleaded in *Engliſh*, but ſet out * in *Latin*; and if it be otherwiſe it is error.

* [165]

(*a*) On this point it was reſolved by PEMBERTON *Chief Juſtice*, JONES and DOLBEN *Juſtices* (*abſente* RAYMOND) that the umpirage was well made; for that the parties had expreſsly given the twenty-firſt day of March to the umpire for executing his authority; that his authority was concurrent, not abſolutely but conditionally, and therefore no confuſion as to the time of making the award or umpirage could ariſe; for that if the arbitrators had made an award that would have been good, but as they had not, the umpirage ſhould bind, S. C. 2 Jones, 168. See alſo Doe v. Roe, 2 Term Rep. 645.

(*b*) The court denied this caſe to be law, S. C. 2 Jones, 168.

(*c*) Stiles 306. S. C. 1 Danv. Abr. 541.

(*d*) In Hilary Term, 18 & 19 Car. 2. Roll 1040. in the King's Bench, 2 Keble, 263. 332.

(*e*) In the King's Bench, in Hilary Term 20 & 21 Car. 2. Roll 101. Reported, 2 Saund. 129. 1 Lev. 285. Raym. 187. 1 Mod. 15. 1 Sid. 428. 455. and 2 Keb. 562. 619.

(*f*) *Sed quære*, for it ſeems that an award of releaſes to the time of the award is good, unleſs it be averred that there were matters in difference between the day of the ſubmiſſion and the day of the award, 1 Roll Abr. 244. 3 Lev. 188. Hutton, 29. Cro. Jac. 353.

Caſe 153. The King *againſt* Smith.

The court will grant a new trial on an indictment for perjury, after a verdict for *the king*, if it appears that it was not wilful and corrupt.

S. C. 2 Jones, 163. 1 Show. 336. 12 Mod. 8. 2 Hale, 310. 2 Hawk. P. C. c. 37. ſ. 12. 4 Bl. Com. 354. 4 Burr. 2257. 3 Wilſ. 59. Cowp. 37. 4 Term Rep. 753.

INFORMATION for perjury. The caſe appeared to be, that the defendant *Smith* went with the juſtices, conſtables, and others to diſturb *a conventicle* in a town in *Leiceſterſhire*, and that he aſked a fellow there his name, and he ſaid *James* (who was a known conventicler) whereas in truth the man named was not there, and the fellow that anſwered knew it, but the defendant did not; but however believing it, he ſwears before the juſtice that *James* was at the conventicle, and thereupon a conviction was had.

And now upon *motion* it being a plain miſtake the verdict was ſet aſide, the oath not being wilful and corrupt perjury.

And

And THE COURT urged as authority for granting *a new trial*, two caſes where verdicts of the ſame nature had been ſet aſide, *Jackſon's caſe* of *Glouceſterſhire*, (*a*) and *Fennick's caſe* (*b*) in my LORD HALE's time.

(*a*) 1 Lev. 124. 1 Keb. 841. (*b*) 1 Keb. 546. 568. 639. 767. 1 Sid. 149. 153.

Tyack's Caſe. Caſe 154.

TYACK being to draw a deed, had writings brought to him, amongſt which he finds one that concerns himſelf and his title, and he detains it.

The court will compel an attorney to re-deliver writings left with him to peruſe, though they concern himſelf and his title. S. C. Skin. 1. Latch. 124. 8 Mod. 306. 340. 1 Salk. 87. Stra. 547. 621. Dougl. 104. 238. 3 Term Rep. 275.

THE COURT forced him to deliver it up, and left him to take his proper remedy at law; and PER CURIAM and counſel at *the bar*, it was ſaid to have been ſo done in one *Paine's caſe* (*a*) in this court, where a ſcrivener detained writings; and *Doble* of *Somerſetſhire's caſe* in LORD HALE's time was the ſame, and ſo ruled, as SAUNDERS and TREMAIN ſaid. So in caſe of an attorney, ſolicitor, or counſel that gets writings, the court forces a delivery very often.

(*a*) 21 Car. 2.

* The King *againſt* Webb. Caſe 155.

* [166]

UPON motion againſt the ſheriff of *Eſſex*, for taking money, &c. in execution; IT WAS RULED BY THE COURT, that though one be in execution for a fine to the king, yet a *levari facias* lies *de bonis et catallis*, and by ſuch writ the ſheriff may take *ready money*; (*a*) and here was cited in KELYNGE's time one *Cadmore's caſe* the ſame rule.

The ſheriff may levy money under a *levari facias de bonis et catallis*. Poſt, 172. 3 Co. 11. 8 Co. 33. 1 Roll Abr. 893. Cro. Jac. 79. Yelv. 68. 1 Burr. 457.

(*a*) See the caſe of Francis v. Naſh, Caſes temp. Hard. 53. and Armſtead v. Philpot, Dougl. 230.

Preſident and College of Phyſicians. Caſe 156.

DEBT on the ſtatute 14 *Hen.* 8. *c.* 5. for five pounds a month for adminiſtering phyſic within *London*, not being of THE COLLEGE, &c. upon *nil debet*, trial at *Guildhall*.

In debt on 14 Hen. 8. c. 5. for practiſing phyſic without licence, the printed ſtatute book is evidence of the charters of THE COLLEGE. Poſt, 234. 4 Mod. 47. 5 Mod. 327, 328. 2 Salk. 451.

PEMBERTON

PRESIDENT AND COLLEGE OF PHYSICIANS.

PEMBERTON *Chief Juſtice* allowed the printed ſtatute book as evidence of their charter and ſtatutes, without any exemplification or ſworn copy of either, and ſaid he would intend them right, unleſs they ſhewed a variance between that and the original in parliament.

A ſtatute printed as an act of parliament ſhall be ſo taken, although the *royal aſſent* to it does not appear. Poſt, 234.

SECONDLY, It was excepted that a copy of the ſtatute was produced by the defendant, and ſworn to be a true copy taken out of the *Roll's Chapel*, and there was no "*Le Roi veut*" in it; and it was alledged that *Cardinal Wolſey* had received a great ſum of money to foiſt it in among others: But MY LORD diſallowed the exception; ſaying, there were ſeveral forms of ſtatutes in ages paſt, and that as this had been allowed an act of parliament ſo often, and in ſo many caſes, he would not diſpute it now.

The college of phyſicians may bring an action on 14 Hen. 8. c. 5. in the names of the preſident and fellows.——Cro. Jac. 121. Cro. Car. 256.

THIRDLY, They took exception, that the preſident only ſhould bring the action. (*a*) But PEMBERTON *Chief Juſtice* ſaid that had been over-ruled frequently.

Qu. If debt on the ſtatute 14 Hen. 8. c. 5. is a popular action within 21 Jac. 1. c. 4.

1 Salk. 372. 1 Stra. 415. 2 Stra. 1081. 2 Hawk. P. C. ch. 26. ſ. 34.

FOURTHLY, It was urged that the practiſing was in *Weſtminſter*, and the action laid in *London*, and by the ſtatute 21 *Jac.* 1. *c.* 4. which lays popular actions in their proper county, it is ſaid, "that if "it appear upon the evidence to be committed in another county, "than where brought, the defendant ſhall be found *not guilty*;" a queſtion was then firſt made whether this action of debt be within this ſtatute. (*b*) As to the laſt point a ſpecial verdict was found.

A Queſtion was alſo made, if that the offence be committed above one year before the action brought? (*c*)

(*a*) See 2 Bulſt. 185. that an action will not lie on this ſtatute by the precedent alone.

(*b*) See Shipman *qui tam* v. Herbert, 4 Term Rep. 109.

(*c*) See White v. Boot, 2 Term Rep. 274.

Caſe 157.

* [167]

* Bellamy *againſt* Ruſſell.

To covenant for non-payment of freight under a charter party, the defendant may plead that the goods were damaged by the fault of the maſter, and that by the cuſtom of merchants he retained the freight in compenſation.

COVENANT upon a charter party between the merchant and a maſter. The merchant was to pay ſo much for freight, and the maſter to deliver the goods at ſuch a port. The breach was aſſigned in non-payment of the freight. The defendant pleads, that the maſter had damaged, waſted, and imbezzled the goods to the value of the freight; and that there was a cuſtom to detain the money which ſhould be paid for the freight in lieu of the goods. The plaintiff demurs.

THE COURT thought the plea good, though to covenant, if there was ſuch a cuſtom.

2 Vent. 212. 242. 2 Ch. Caſ. 75. 1 Sid. 236.

THE

The plaintiff therefore prayed leave to waive his demurrer and to take iſſue, which was granted (*a*).

BELLAMY v. RUSSELL.

NOTE, Such a cuſtom there is between the maſter and hired ſeamen, to deduct out of their wages what goods are damnified, which makes them the more careful (*b*); as ſeveral of THE BAR ſaid.

The maſter may, by cuſtom, deduct for damages from the ſeamen's wages.

(*a*) See Malyn's Lex Mercatoria, edit. 1686, that, by the *cuſtom of merchants*, as well as by the covenants of the charter party, the maſter ſhall be anſwerable for damages occaſioned by his neglect, Malyn, 102. Boucher v. Lawſon, Caſes temp. Hardw. 85. 194. See alſo Pariſh v. Crawford, Stra. 1251. Froward v. Duſfield, 3 Atk. 555. Paul v. Birch, 2 Atk. 621. Lutwidge v. Grey, 2 Burr. 882. Luke v. Lyde, 1 Bl. Rep. 190. Watkins v. Carmichael, Dougl. 101. Abernethey v. Landale, Dougl. 539. Hotham v. Eaſt India Company, Dougl. 271. Lempriere v. Paſley, 2 Term Rep. 485.

(*b*) See Poſt, 283.

Michaelmas Term,

The Thirty-third of Charles the Second,

IN

THE COMMON PLEAS.

Sir FRANCIS NORTH, *Knt. Chief Juſtice.*

Sir HUGH WYNDHAM, *Knt.*
Sir JOB CHANDLER, *Knt.*
Sir CRESWELL LEVINZ, *Knt.*
} *Juſtices.*

Sir WILLIAM JONES, *Knt. Attorney General.*

Sir FRANCIS WINNINGTON, *Knt. Solicitor General.*

The King *againſt* Sowton.

Caſe 158.

Eaſter Term, 32 *Car.* 2. *Roll* 659.

QUARE IMPEDIT by the king on the ſtatute of 31 *Eliz. c.* of ſimony, againſt *L.* the incumbent: the defendant pleads in *abatement* (*a*), that the very patron is not named.

A *quare impedit* by the king againſt the *incumbent*, to preſent by reaſon of *Simony* in the *incumbent*, need not make *the patron* a defendant. S. C. 3 Lev. 16. 7 Co. 26. 58. Savil, 108. 2 Lut. 1086. N. Lut. 345. 3 Lev. 83. 115. 206. Dyer, 48. 1 Leon. 45. 2 Leon. Hob. 320.

Argued, that in all caſes of a diſturber the parſon or patron ought to be named (*b*). No patron ought to loſe his right at common law without being heard, though another may ſay as much; yet it is but reaſonable to hear him, for the incumbent may confeſs the ſimony, &c.

(*a*) Cro. Jac. 651.
(*b*) Hob. 316. 320. 5 Hen. 7. pl. 35. Smalb. 410. 3 Hen. 4. pl. 2. 22 Edw. 4. pl. 44. 47 Edw. 3. pl. 12. 7 Edw. 4. pl. 44. and authorities dire& are Hob. 320. 42 Edw. 3. pl. 7. and 18 Edw. 3. pl. 20.

E contra it was ſaid, all the reaſons given are, that he may mke his defence; here he can have none to make; for the declaraon charges not the parſon, but only that the incumbent is a *ſimoniack*.

LORD NORTH *Chief Juſtice*. He need not be named.

WYNDHAM *Juſtice* of the ſame opinion. Where his right i concerned he muſt * be named, otherwiſe where it is not: and h cited *Hall's caſe*. (*c*)

CHARLETON *Juſtice*. It ſtartles me; for the patron ought t have a regard to his preſentee, and defend him when he is in, and hi work is not done by mere preſentation.

LEVINZ *Juſtice* of opinion that the plea is ill, and that the patro ought not to be named.

And judgment was for the plaintiff.

(*c*) 7 Co. 26. Palm. Rep. 207.

Michaelmas Term,

The Thirty-third of Charles the Second,

IN

THE KING's BENCH.

Sir FRANCIS PEMBERTON, *Knt. Chief Juſtice.*

Sir THOMAS JONES, *Knt.*
Sir WILLIAM DOLBEN, *Knt.* } *Juſtices.*
Sir THOMAS RAYMOND, *Knt.*

Sir ROBERT SAWYER, *Knt. Attorney General.*

Sir FRANCIS WINNINGTON, *Knt. Solicitor General.*

Strode *againſt* Deering.

Caſe 159.

Trinity Term, 32 *Car.* 2. *B. R. Roll* 945 *or* 905.

TRESPASS for falſe impriſonment. The defendant pleads, that at a court in the borough of *Melcombe Regis*, a *plaint* was levied againſt the plaintiff, and afterwards *a precept* awarded, returnable at the *next court*; (*a*) by virtue thereof he was taken at ſuch a place *infra juriſdiction. Cur'*, &c.

A juſtification under proceſs from an inferior court muſt ſhew by what authority the court was held.

An exception was taken and allowed, becauſe they do not ſet forth how that court had its commencement, whether by charter or preſcription; nor what juriſdiction it has, nor when the *next court* was held. S. C. 2 Jones, 165. N. Lut. 293.

And judgment for the plaintiff.

(*a*) See Rowland v. Veale, Cowp. 18.

Caſe 160.

Morgan *againſt* Vaughan.

Michaelmas Term, 26 Car. 2. Roll 207.

In dower, if the tenant be an infant, and appear by *attorney*, the judgment is erroneous. Ante, 61.

ERROR upon a judgment in dower in the ſeſſions at *Brecknock*.

The error aſſigned was, that he was under age, *viz.* of the age of fourteen years, and appeared by attorney; and upon iſſue of *infra ætatem*, the trial was in *Abergavenny* where the tenant was commorant.

An infant is not eſtopped to reverſe a judgment in dower, by aſſigning error by *attorney*, although it appear on the record that he was an *infant* when the writ of error was brought.

It was argued now that the judgment ſhould not be reverſed, becauſe it appears of the plaintiff's own ſhewing that he was under age when he brought his writ of error, and at the time of his aſſignment of errors, which he has done by attorney: now he ſays he was then of fourteen years of age, which is not ſeven years ſince; this is material, and though it be ſurpluſage, yet himſelf ſhall be bound by it; and cited the caſe of *Herd v. Baſkervill*, (*a*) and *Holden v. Wolfe*, (*b*) this ſurpluſage muſt compel us to ſay the contrary.

S. C. 2 Jones, 170. S. C. Ray. 456. S. C. Skin. 10.

In *dower* for lands lying in B. if error be aſſigned that the tenant was an infant at A. and appeared by attorney, an iſſue taken on the *non-age* is well tried in the county of A. for it is an iſſue *collateral* to the title to the land. S. C. Ray. 458. 7 Co. 2. Vaugh. 404. Hard. 66. 1 Mod. 37. 1 Vent. 54. 1 Com. Dig. "Action" (N. 5.) (N. 12.) Strange, 8. 25.

Then here is a *miſtrial:* it appears * the land lies in *Brecknock*. Error is brought in *Middleſex:* the tenant was in *Abergavenny*, in which is the aſſignment of non-age; and the trial was in *Abergavenny*. Now the trial ought to have been where the land lies: dower is a real action, and a writ of error to reverſe judgment in dower is the ſame; and infancy in ſuch caſe ſhould be tried where the land lies, (*c*) *Green v. Roſe*. (*d*) And in perſonal actions where the action is brought, otherwiſe the defendant might be carried any where.

MR. HOLT *è contra*. As to the *viz.* that is not any material part of the plea, but mere form; and if it were more it would be iſſuable, which it is not, for the ſubſtance is, if he were within age at the time, and not whether he were fourteen years of age, &c. The alledging of a thing not material ſhall not eſtop: it is a general rule that it does not deſtroy the right; and an allegation that does not go againſt the right will never prejudice.

As to the trial, it is aſſigned for error that A. of ſuch a place was within age, which is all one as if ſaid he was commorant in *Abergavenny*. This being a writ of error on a judgment in dower, whether infant or not is collateral to the title of the land, *viz.* dower. If the right of the land depend upon infancy it muſt be tried where the land lies, but otherwiſe if the right be not, &c. *Fitzh.* 63. 1 *Buiſt.* 120. 179.

* [169]

THE LORD CHIEF JUSTICE at firſt ſaid, that where infancy is

(*a*) Hob. 233. 4 Co. 42.
(*b*) Palm. 153.
(*c*) Ante, 163. 2 Roll Abr. 604. 608.
(*d*) Cro. Eliz. 818.

alledged

alledged generally without *a venue*, it must be where the land lies, but where a *special venue* is laid it may be tried there.

MORGAN v. VAUGHAN.

JONES *Justice* took a difference. Where the defendant pleads a release, and the plaintiff replies "within age," there it need not be tried where the land lies.

THE LORD CHIEF JUSTICE. As to the *viz.* if that be of a thing which is impossible, it is no conclusion or estoppel, and it would be hard to make it so in this case.

And at last THE WHOLE COURT resolved, the trial was well enough; and a rule for reversal of the first judgment in the grand sessions, *nisi*, &c.

* The King *against* Alsop.

Case 161.

* [170]

A *peremptory mandamus* will not lie to admit to the *fellowship* of a college that has *a visitor*, although it do not appear by the return that there was a visitor at *the time* of refusal, or that his authority extended to *admit* or *refuse* admission to fellows.

S. C. 2 Jones, 174.
Poll. 178.
Raym. 31. 101.
1 Show. 74.
1 Sid. 71.
1 Mod. 82.
3 M[illegible]
1 Lev. [illegible]
2 Lev. [illegible]
Carth. [illegible]
B. R. [illegible]
Do[illegible]
1 Wil[illegible]

MANDAMUS to swear one fellow of *All Souls* college in *Oxford*. To which they return, that the archbishop is their *visitor*, and they were all subject to his orders, and that, &c.

MR. POLLEXFEN against the return.

FIRST, They have not set forth that at the time of the refusal there was any visitor; and if so there was no power that extended to this case.

SECONDLY, There are cases adjudged that this court has jurisdiction; in *Dr. Patrick's case*, (*a*) about the presidentship of *Queen's College*, the court was divided whether visitors ought first to be applied to; in *Dr. Appleford's case* (*b*) it was agreed, that if there be no visitors it is within the jurisdiction of the court; (*c*) there is neither ordinary nor visitor in the case in question.

THIRDLY, If there must be a visitor, yet unless he can redress, this court has jurisdiction; they have only returned that he was archbishop, but not at the time; and therefore it must come hither.

DOLBEN *Justice*. It was resolved by LORD HALE in *Dr. Roberts's case*, (*c*) that if there be a visitor, this court has no jurisdiction, for he is like a judge chosen by themselves; the putting out belongs to him, as by the return appears; *a fortiori* the admission; and being duly elected is under his judgment: the general words do strongly imply it. As to the objection, that it is not said he was visitor at the time of the refusal; that is insignificant, for there is a visitor set forth to whom they must appeal, and this is

(*a*) 13 & 14 Car. 2. Raym. 101. 1 Lev. 65. 1 Sid. 346. 1 Keb. 289. 2 Keb. 65. 164. 259.

(*b*) 1 Mod. 82. 2 Keb. 799. 861.

(*c*) If no special visitor be appointed by the *founder* of a private eleemosynary lay corporation, the right of visitation, in default of his heirs, devolves upon THE KING, to be exercised by his GREAT SEAL, and therefore the court refused to interfere by *mandamus* to compel the master and fellows of *St. Catherine's Hall* in *Cambridge* to declare one of their fellowships vacant, and to proceed to a new election, *Rex v. St. Catherine's Hall*, 4 Term Rep. 233.

enough;

enough; and if this court ſhould take juriſdiction thereof, it would deſtroy the right of all foundations, I mean the power of viſiting; *Appleford's caſe* was in the twenty-third year of *Charles the Second.*

THE LORD CHIEF JUSTICE. It ſeems that the viſitor has an intire power, and there can be no appeal from him. The caſes are ſtrong, that the viſitor has power, as ſuch, to determine theſe matters that belong to the college; and it is almoſt an arbitrary power: (*d*) the objection as to the time has no weight; becauſe if the viſitation be made after the election, it is all * one; for if the archbiſhop be conſtant viſitor, he may viſit and compromiſe things done in his predeceſſor's time. (*e*)

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(*d*) A viſitor cannot refuſe to exerciſe his viſitorial power; and therefore the court will grant a *mandamus* to compel him to hear an appeal, and to give ſome judgment, Rex v. Biſhop of Lincoln, 2 Term Rep. 338 n. (a).

(*e*) The return was allowed by all the court, S. C. 2 Jones, 175.

Caſe 162. Progers *againſt* Fraſier.

In the Court of Chancery.

The king may grant the cuſtody and guardianſhip of an idiot, to a man, his executors, adminiſtrators, and aſſigns, during the life of the idiot.
S. C. 1 Lq. Ab. 276.
S. C. 2 Ch. Caſ. 70.
S. C. 3 Mod. 43.
S. C. 1 Vern. 9. 137.
S. C. Skin. 4. 138. 177.

THE KING grants the cuſtody and guardianſhip of an idiot to *Sir Alexander Fraſier* and his aſſigns for years, if the idiot ſhould live ſo long. *Sir Alexander* dies.

The queſtion was, Whether this ſhould go to the executors, or the guardianſhip be committed a-new?

It was urged for *Progers* the committee, that an office cannot be granted for years; upon *Sir George Reynolds's caſe*, 9 *Co.* 95. and *Lentall's caſe*, *Cro. Car.*

It was urged on the other ſide for *Madam Fraſier* the executrix, that here is an intereſt and no public truſt; and that caſe of an office has been denied to be law by my LORD HALE, upon the reaſons even of the book; and ſo ruled in the caſe of *Deal* v. *Prior*, in the Exchequer, when he was Lord Chief Baron, that the office of the policies of aſſurance was held grantable for years, upon ſolemn debate and conſideration; and LORD HALE ſaid, the true reaſon of *Sir George Reynold's caſe* was the cuſtom of its being granted in fee.

FINCH *Lord Chancellor.* I am of HALE's opinion, that an office may be granted for years; for the ſame inconveniences attend a fee, and a perſon unknown and unfit, as *infant* or *feme covert*, may happen to have the ſame under an eſtate of inheritance; but here it is a branch of the king's prerogative, and a great branch too, it is part of that protection which he owes to his ſubject; and here this guardianſhip might have been in ſuſpence, and to a failure of that protection; for it is eaſily ſuppoſable that there might be a conteſt about the executorſhip and adminiſtration, and none perhaps granted to this day; and then what would have become of the idiot in the

PROGERS v. FRASIER.

mean time? And therefore he over-ruled the plea which *Madam Frafier* had put in to the bill, which *Progers*, having a new grant of the cuſtody, had brought there; but ſaid, that *Progers's* title was bad too, being grounded upon an inquiſition that * was naught, (*a*) and on that he would have diſmiſſed the bill, but at laſt ordered the party to be brought into court. (*b*)

* [172]

NOTE, The inquiſition ſaid ſhe became ſo *per viſitationem dei.*

And MR. ATTORNEY GENERAL ſaid the fact was that it was a fine child till eight years of age, and conſequently not *an idiot*, but *a lunatic*, and the guardian accountable.

On which THE LORD CHANCLLOR ſaid, that no ſuch committee ſhould get ſix-pence by a lunatic, ſave for food, clothing, and phyſic; they ſhould daily account before A MASTER, and the overplus be placed out on ſecurity, where the adminiſtrator of the lunatic might know how to find it. (*c*)

(*a*) The inquiſition found *Bridget Dennis* to be an idiot, not having any lucid intervals *per ſpatium octo annorum*, and on its being pleaded by *Frafier* to an action of treſpaſs brought by *Prodger* in the court of King's Bench, in Eaſter Term, 36 Car. 2. the court held the inquiſition to be good; for that the finding her to be an *idiot* was ſufficient without the addition of any other words, and therefore *per ſpatium octo annorum* might be rejected as ſurpluſage, 3 Mod 44.

(*b*) The court of chancery conceived that a grant of the cuſtody of an idiot to a man, his executors, adminiſtrators, and aſſigns, to be bad, S.C. 1 Vern. 9. but directed *Prodger* to bring an action of ejectment in the court of King's Bench, to try the validity of the patent granted to *Sir Alexander Frafier*, S. C. 1 Vern. 137. and the court was of opinion that the grant was good, and that the intereſt therein paſſed to the executor of the grantee. S. C. 3 Mod 44 See the arguments, S. C. Skin. 138. 177.

(*c*) See Francis's caſe, Moor, 4; the caſe of Shelden v. Forteſcue, 3 Peer Wms. 104; Rochford v. Earl of Ely, 6 Brown's Parl. Caſes, 329. Knipe v. Palmer, 2 Wiſ. 130.

The King *againſt* Greenway.

Caſe 163.

RESOLVED by the court, that upon an *habeas corpus*, the gaoler is bound to bring the body, although he has not his charges tendered him. But he may move the court, and they will rule that he ſhall have his charges firſt. And this was ruled in the caſe of the defendant, who was ſteward of a manor court in *Cornwal*, who was brought hither on *an attachment* for making ſuch a return to an *habeas corpus*, VIZ. that he was not paid or tendered his charges.

A gaoler muſt obey a *habeas corpus*, although the priſoner refuſe to pay his fees.

2 Jones. 178. 1 Keb. 272. 280 566. Marſh. 89. 2 Roll Abr. 32. ch. 22. ſ. 31.

Barnes, 377. 1 Roll. Abr. 338. 1 Stra. 308. 2 Stra. 814. 1262. 2 Hawk. P. C. 1 Burr. 443. 2 Burr. 1152. Tidd's Practice, 176.

Caſe 164. The King *againſt* Viſcount Hertford.

If money or goods be depoſited with a perſon to keep generally, without any reward for ſo doing, and he is robbed of them, he is not anſwerable.

Dr. & St. 2 ch. 38
Ld. Ray. 915.
Jones on Bailments, 45.

RESOLVED by PEMBERTON *Chief Juſtice*, in the caſe of a clerk belonging to the late ſheriff of *Hertford*, upon evidence at *Guildhall* in a trial againſt him, that if money be delivered to one to keep generally without any conſideration or reward for ſo doing, if the perſon be robbed he is diſcharged, and the owner ſhall bear the loſs, contrary to COKE in the firſt Inſtitute.

The fact was; there being an execution againſt the plaintiff, he brings ninety pounds to the defendant, part of the condemnation money, which he refuſed to take, ſaying the plaintiff in the action would not accept it, and he had nothing to do with it, he muſt go to him; * and the party ſaid, "he would be in town next *Friday*, "pray do you keep it till then, and I will come again to you when "the plaintiff will be here," and accordingly went away; and before the *Friday* the defendant's chamber was robbed.

* [173]

And NOW HELD that no action lies againſt him,

Hilary

Hilary Term,

The Thirty-third and Thirty-fourth of Charles the Second,

IN

THE KING's BENCH.

Sir FRANCIS PEMBERTON, *Knt. Chief Juſtice.*

Sir THOMAS JONES, *Knt.*
Sir WILLIAM DOLBEN, *Knt.*
Sir THOMAS RAYMOND, *Knt.*
} *Juſtices.*

Sir ROBERT SAWYER, *Knt. Attorney General.*

Sir FRANCIS WINNINGTON, *Knt. Solicitor General.*

Thompſon *againſt* Goodfellow.

Caſe 165.

MR. WILLIAM THOMPSON ſues a *mandamus* to be ſworn judge of the ſheriff's court, *London.*

The election of judge of the *ſheriff's court* in *London* is in the *common council*, and not in the *lord mayor* or *ſheriffs*.

And upon debate IT WAS AGREED, That the election or nomination of a perſon to that office lay in the *common-council*, and not in the *lord mayor* or *ſheriffs*; and ſaid, that in the caſe of *Proctor* v. *Philip*, in LORD HALE's time (*a*), it was controverted and at length ſo determined.

But *Thompſon* afterwards deſiſted, though ſaid to have had the majority of voices in the common-council.

(*a*) Hardw. 311. 327.

Holborne,

Caſe 166. Holborne, Widow, *againſt* Sir Philip Lloyd.

The court of THE VERGE may try an indictment for murder committed within the limits of its juriſdiction.———3 Term Rep. 741.

INDICTMENT for murder within *the verge*; and on a trial there the defendant was convicted of manſlaughter, though by ſome held to be plain murder.

A perſon convicted of manſlaughter, and *appealed*, could not demand his clergy until he was arraigned on the appeal.

* [174]

* The defendant appearing in the court of King's Bench, and the widow having brought her *appeal*, he prays his clergy, and that his prayer might be recorded.

But THE COURT denied it, and ſaid, he ſhould be firſt arraigned on the appeal which the widow of the party ſlain had brought.

And ſo he was, and then had a week's time given him to plead.

And as to his prayer of clergy they ſaid they would conſider of it; and ſo done in the caſe of widow *Sampſon v. Tothill* (*a*).

(*a*) Eaſter Term, 21 Car. 2. 1 Sid. 324. See the caſe of Siddons v. Johnſton, Poſt, 375. and Goring v. Deering, 3 Mod. 158. in which it was agreed, that the Court may refuſe to record the priſoner's prayer of clergy in order to give advantage to the appeal, by preventing him from pleading the conviction and clergy in bar; but in the caſe of Armſtrong v. Liſle, theſe caſes are overruled, and it is now fully ſettled, that a conviction of manſlaughter on an indictment of murder, and the prayer of clergy, or that he was ready to pray his clergy thereon, may be pleaded in bar of an appeal for the ſame death, Keilynge 106. 1 Salk. 63. 5 Burr. 2801.

Caſe 167. Anonymous.

Judgment by *nihil dicit* in debt on bond, againſt AN HEIR ſhall be *general* to recover the debt.
Cro. Eliz. 692.
W. Jones, 88.
6 Co. 47.
2 Roll Abr. 70.
Stiles, 288.
Poph. 155.
7 Mod. 40.
Ld. Ray. 786.
3 Bac. Abr. 30.
Salk. 354.

DEBT on a bond againſt an heir, and judgment by *nihil dicit*.

FINCH *Solicitor General* argued, that the judgment ought to be ſpecial, and he ſaid, there were great opinions againſt the caſe of *Day v. Pepis*, in *Plowden* (*a*).

But PEMBERTON *Chief Juſtice* inclined to the contrary, and ſo did THE BAR and all THE COURT, who bid him bring his writ of error.

MR. GIRDLER ſaid, He had ſeen ſeveral caſes in this court, where upon prayer there was a ſpecial execution, and that he had the number-rolls of ſeveral which he had peruſed; and in ſome caſes ſuch a ſpecial execution may be very advantageous, for that then ſuch lands were chargeable from the *teſte* of the original; whereas on a general one they might be aliened before execution (*b*).

Percivall

(*a*) Plowd. 438.
(*b*) By 3 Will. & Mary, c. 14. ſ. 5. "in all caſes where any heir at law ſhall "be liable to pay the debt of his anceſtor, "in regard of any lands, tenements, or hereditaments deſcending to him, and ſhall "alien the ſame before action brought, or "proceſs ſued out againſt him, ſuch heir "at law ſhall be anſwerable for the debt "to the value of the lands ſo aliened; "and

Percivall *againſt* Criſpe. Caſe 168.

Eaſter Term, 33 Car. 2. Roll

If a freeman of London die inteſtate, *the third* part of his effects given to his adminiſtrator by the cuſtom of *London*, ſhall be diſtributed according to the ſtatute of diſtributions.

S. C. 2 Jones, 204.
S. C. Skin. 26. 41.
Poſt, 407. 450. Carter, 125.

PROHIBITION. A freeman of *London* dying inteſtate, the queſtion was, Whether the act 22 & 23 *Car.* 2. *c.* 10. of diſtribution ſhould reach the adminiſtrator's third, or the death's part, or whether the ſaving that is in the ſtatute of the cuſtom of *London*, ſhall preſerve the adminiſtrator's third from a diſtribution.

It was argued, That an adminiſtrator was only ſince the ſtatute of 31 *Edw.* 3. *c.* 11. and conſequently within the time of memory; although in *Snelling's caſe* (*a*) it ſeems to be held, that it was before time of memory; * it is true, an adminiſtrator ſhall have a third by the cuſtom of *London*, but yet he ſhall make a diſtribution, for it is not *deſcriptio perſonæ* but of the office, it is called "the death's "part," and he might have deviſed it, or part of it away; but he could not meddle with or diſpoſe of the other parts; and the other conſtruction of its not being diſtributable is to ſet it on the ſame foundation with the other two parts: and if the adminiſtrator has it according to cuſtom, then ſuppoſing a will and no executors, he ſhall not be forced to pay the legacies according to that; a cuſtom never gives the ſame intereſt which the law does: the words of the ſtatute of diſtribution are, "That it ſhall not prejudice the cuſtom "of particular places:" and it is only confirming as to the two parts which are cuſtomary.

* [175]

It was urged *è contra*, That at common law the ordinary was adminiſtrator, and by the cuſtom the adminiſtrator has his part, and he is a cuſtomary adminiſtrator, and the ſtatute has done no more than it ſuppoſes the inteſtate would have done had he lived and made a will.

DOLBEN *Juſtice*. If a citizen die without a wife or children, then this ſtatute ſhall make a diſtribution.

PEMBERTON *Chief Juſtice*. Then there is no cuſtom.

(*a*) 5 Co. 82.

"and execution ſhall be taken out on "judgment againſt ſuch heir, to the value "of the land, as if it were for his own "debt."—"And in any action of debt upon "a bond of his anceſtor, he may plead "*riens per diſcent* at the time of the *ori-* "*ginal writ* brought or *bill* filed againſt "him, and the plaintiff may reply lands, "&c. from his anceſtor, before the ori- "ginal writ brought or bill filed; and if "the iſſue be found for the plaintiff, the "jury ſhall enquire of the value of the "lands ſo deſcended, and thereupon judg- "ment ſhall be given, and execution award- "ed as aforeſaid; but if judgment be gi- "ven againſt him by confeſſion of "the action, without confeſſing *aſſets de-* "ſcended, or upon demurrer or *nihil du-* "*cit*, it ſhall be for the debt and damages, "without any writ to enquire of the land, "&c. ſo deſcended."—It ſeems, therefore, by this ſtatute, that the plaintiff ſhall only recover *pro tanto*, with reſpect to the value of ſuch aſſets, and ſhall not have a *general judgment* againſt the heir, as at common law, Carth. 354; nor if the heir plead a bad plea, a general judgment *de bonis propriis* ſhall be entered againſt him, unleſs the plaintiff will content to take a ſpecial judgment, Smith v. Angel, 2 Ld. Ray. 783.

DOLBEN

PERCIVALL v. CRISPE.

DOLBEN *Juſtice.* But then if it reach to two thirds only it cannot be a cuſtom to the whole: it was ſaid he cannot deviſe a poſſibility, that if one child die it ſhall go to another, but there muſt be a new diviſion.

Quære, Where there are two children and one dies, if his part will ſurvive by the cuſtom of *London*; or if it ſhall go to the adminiſtrator.

The cuſtom of London that the third part of the effects of an inteſtate freeman ſhall go to his *adminiſtrator*, is good; although an adminiſtrator was conſtituted by 31 Ed. 3. c. 11. and ſo within the time of legal memory. 1 Roll Abr. 906. 2 Roll Rep. 217. 1 Lev. 158.

THEN IT WAS URGED again, that there was no adminiſtrator at the common law, and cited *Henſlowe's caſe* (*b*). The ordinary had a peculiar power; he could neither ſell nor diſpoſe of any thing; he could neither ſue nor be ſued, ſays *Plowden* (*c*); and cited *Fotherbie's caſe* (*d*); no ſuch creature as an adminiſtrator at the common law; and if any perſon died inteſtate, his eſtate was to be called into the care of the ordinary, and he did appoint an immediate *curator*, but it was not ſuch a thing as an adminiſtrator is now: a man muſt alledge an office to be *antiquum* before he can preſcribe to it or * any of its perquiſites; and if you would entitle yourſelf to be adminiſtrator by cuſtom, you ſhould ſay there was ſuch a thing time out of mind; beſides, this is an adminiſtration committed by the metropolitan, and that is expreſsly within the ſtatute.

* [176]

AGREED BY ALL that the heir is not excluded, but ſhall come in for his part, and ſhall have it by the cuſtom of *London*; in *Fitzherbert's Natura Brevium*, 122. this cuſtom is laid to be of the whole eſtate.

THE LORD CHIEF JUSTICE. If *Snelling's caſe* (*e*) ſtand for good law, then an adminiſtrator may preſcribe to his third part: a man may have a thing in his own right, and yet it cannot deſcend as in caſe of an occupant.

NOTE, It was agreed, That if a freeman give legacies in his will, and name no executor, whereupon there are letters of adminiſtration granted *cum teſtamento annexo*, that it is plainly out of the ſtatute of diſtribution (*f*).

Adjournatur (*g*).

(*b*) 9 Co. 38. Hob. 83. Carter, 126.
(*c*) Plowd. 277, 278. 280.
(*d*) Cro. Car. 62. Lit. Rep. 21. 2 Inſt. 398. See 1 Com. Dig. "Adminiſtration," (F.)
(*e*) 5 Co. 82.
(*f*) See the ſtatute 11 Geo. 1. c. 18. ſ. 17 & 18.
(*g*) In EaſterTerm, 34 Car. 2. it was adjudged for the plaintiff, *viz.* that on a freeman of the city of London dying inteſtate, leaving a wife and one child, one part ſhall go to the wife, another to the child, and the third part to the adminiſtrator, notwithſtanding the ſtatute 22 & 23 Car. 2. c. 10. S. C. 2 Jones, 204; and it is ſaid, S. C. Skin. 41. that it was decreed afterwards in Chancery, that the adminiſtrator's part is within the cuſtom, and not liable to a diſtribution on the ſtatute, 2 Freem. 85. 7 Viner, 216. But it is now enacted by 1 Jac. 2. c. 17. ſ 8. that the exception in the 22 & 23 Car. 2. c. 10. reſpecting the cuſtom of London, "was never intended, nor ſhall be taken or conſtrued "to extend to ſuch part of any inteſtate's "eſtate as any adminiſtrator, by virtue "only of being adminiſtrator, by pretence "or reaſon of any cuſtom, may claim to "have, to exempt the ſame from diſtribution; but that ſuch part in the hands of "ſuch adminiſtrator ſhall be ſubject to "diſtribution as in other caſes within the "ſaid act."

The

The King *against* Smith. Case 169.

AARON SMITH being bound by recognizance to appear here the first day of the term, and appearing accordingly was charged with an information for words.

A person appearing in the court of King's Bench pursuant to his recognizance, may be charged with an information, and forced to plead *instanter*.

2 Hawk. P. C. 178.

And forced to plead presently; for that in such case he is in the same condition with an attorney or clerk of the court, who are always supposed present in court, and have the benefit of an imparlance; but in case a man come in upon process, and appear to an information, (*a*) he has then an imparlance till the next term after.

And it was said by MR. POLLEXFEN, that all persons had an imparlance till SIR SAMUEL ASTREY's time.

(*a*) 2 Hawk. P. C. ch. 27. s. 14.

William Thompson *against* Sir William Scroggs. Case 170.

TRESPASS for a battery, laid in *London*; the fact was committed at *Bury* in *Suffolk*.

The changing a *venue* is *ex gratia curiæ*, and not *ex debito justiciæ*.

1 Mod. 64. Stiles, 460. 2 Ld. Ray. 1556. Stra. 822. 1 Wils. 159. 2 Salk. 668. 1 Com. Dig. "Action," (N. 13.)

Motion to change the *venue*.

It was agreed PER CURIAM, that changing a *venue* is *ex gratia curiæ*, and not *ex debito justiciæ*; so resolved in the case of the *Lord Culpeper v. Sir* * *Thomas Taylor*; (*a*) and the granting motions for the change thereof are upon account of the convenience of the subject, it being supposed to be more for their ease that the fact should be tried in the place where committed.

* [177]

A *barrister* has the privilege to lay any transitory action in *Middlesex*.

Post, 242. Stiles, 460. Stra. 822. 1 Wils. 159. Salk. 670. 1 Com. Dig. "Action," (N. 13.)

And it was likewise agreed that *Bacon's case* (*b*) in this court was law, that a plaintiff being *a barrister* had privilege to lay any transitory action which he brought, in the county of *Middlesex*; for his attendance is supposed to be continually on the courts at *Westminster*; and so if he were defendant. (*c*) But privilege in the defendant takes not away the plaintiff: (*d*) and here they being both barristers, if *Mr. Thompson* would lay it in *Middlesex* they would not change the *venue*, which he agreed to do.

JEFFERYES *Serjeant* thereupon moved for a trial at bar, and granted.

But afterwards *Mr. Thompson* forgave it, and desisted; on a treat given by *Sir William Scroggs*, &c.

(*a*)

(*b*)

(*c*) See Row v. Russell, Post, 242. Winsfield's case, 1 Mod 64. Seaman v. Lin[illegible], 2 Salk. 668 Knight v Farnaby, 2 Salk. 670. Lacker v. Harcourt, 1 Show. 148.

(*d*) See the case of Bisse v. Harcourt, Carth. 126. Pope v. Redfearne, 4 Burr. 2027. Lyde v. Rodd, 1 Brown's Cases in Parl. 328. and Yeardley v. Roe, 3 Term Rep. 573. and Mr. Kyd's edition, 1 Com. Dig. 175.

Wedgewood

Wedgewood and others *againſt* Bayly.

TROVER and converſion. One of the plaintiffs dies before verdict, which is after found for the plaintiff.

This is aſſigned for error on a writ of error; and here were cited the caſe of *Spring v. Ballet*, (*a*) where it was held, on motion, that the writ is not abated; here it is on writ of error, and in the caſe of *Leigh v. Burgamy*, (*b*) treſpaſs brought by two jointenants, one dies, and held the writ ſhould abate, as it is in all caſes, unleſs of neceſſity, or in a *quare impedit* and *audita querela*: ſee *Spencer v. Woodward*, (*c*) and *Liſle v. Gray*. (*d*) And in a writ of error here about a twelvemonth ſince, one of the plaintiffs dying we brought a new writ of error, the judges being of opinion that the writ abated.

DOLBEN *Juſtice*. In perſonal actions where two join, it many times ſurvives; beſides, why ſhould it abate in the plaintiff's caſe more than in the defendants. (*e*) Two tenants in common of a ſhop, one may bring an action for his moiety of the ſhop; and ſo for half a negro, and ſo it has been allowed.

178] *PEMBERTON *Chief Juſtice*. The caſe of *Spring v. Ballet* is dark as to the reaſon of it; for why ſhould they join in caſe of *a horſe*, and ſever in caſe of *a negro*.

And it was ſaid BY ALL, that chancery hath been and ſtill is endeavouring to deſtroy ſurvivorſhip, and that it was the attempt of the commiſſioners in the late times.

In the next term it was moved again, and then urged the caſe of *Hill v. Tempeſt*, *Cro. Eliz.* 145. that one defendant dying before the laſt continuance, in regard the judgment was only againſt him that ſurvived, the writ ſhould not *abate* as to him; (*f*) and that in the caſe of *Spring v. Ballet*, 2 *Bulſt.* 262. it is held on motion, that though one plaintiff die yet it ſhould not abate; and *Sir Oliver Lee's caſe* was in the firſt year of *James the Firſt*, but the caſe of *Read v. Readman* was in the tenth year of *James the Firſt*, it is in 10 *Rep.* 134.

E contra. It was argued that the right to one moiety accrued after, and therefore at the time when this action was brought, he had ſuch a right to a moiety only: now a right accrued pending an

(*a*) 2 Bulſt. 262.
(*b*) Cro. Jac. 19.
(*c*) Yelv. 208.
(*d*) Ante, 6.

(*e*) See 17 Car. 2. c. 8. and 8 & 9 Will. 3. c. 10.

(*f*) By 8 and 9 Will. 3. c. 11. ſ. 7. "If there be two or more plaintiffs or defendants, and one or more of them ſhould die, if the cauſe of ſuch action ſhall ſurvive to the ſurviving plaintiff or plaintiffs, or againſt the ſurviving defendant or defendants, the writ or action ſhall not be thereby *abated*; but ſuch death being ſuggeſted on the record, the action ſhall proceed at the ſuit of the ſurviving plaintiff or plaintiffs againſt the ſurviving defendant or defendants."

actio

action, will not ſupply the want of it when the action was brought: the caſe of an *avowant* will not be like this, becauſe here in our caſe the action is begun, and the thing to be recovered is mentioned before. *Whittingham v. Lord Derby's tenants*, *Hob.* 287. a *ſcire facias* by huſband and wife, and the huſband dies; the report there is a *Curia adviſare vult*, but in *Hutt.* 37. it is ſaid *per totam Curiam* that it ſhall abate.

WEDGEWOOD v. BAYLY.

Adjournatur. (*g*)

(*g*) The judgment was reverſed, S. C. Ray. 463, principally upon the authority of the caſe of Rean v. Redman, 10 Co. 134. and ſee the caſe of Capel v. Saltanſtall, 3 Mod. 249.

The King *againſt* The College of Phyſicians. Caſe 172.

MANDAMUS prayed for *Dr. Merrit* to the College to receive him to be one of the honorary fellows.

A *mandamus* will not lie to the College of Phyſicians to admit an honorary fellow of a colledge.

Ante, 170.
1 Sid. 29.
Carth. 92.
1 Lev. 19.

PEMBERTON *Chief Juſtice.* No *mandamus* lies; for it is no place of profit; no way advantageous to him; nor in the leaſt relating to the government. (*a*) It is a thing ſpontaneouſly raiſed among themſelves, and like to the *inns of court*, which are voluntary ſocieties; and in *Boreman's caſe* (*b*) they could never get one; and I remember when SERJEANT GLYNNE ſat here, MR. ALLEN moved ſtrongly for ſuch *a mandamus*, and on ſolemn debate it was denied; * and the reaſon why it lies for *a common council man* is, becauſe it concerns the government.

* [179]

(*a*) But ſee the caſe of Rex v. Aſkew and others, Cenſors of the College of Phyſicians, 4 Burr. 2186.

(*b*) March. 177. See alſo Stiles, 457. Raym. 69. and Rex v. Gray's Inn, Dougl. 353.

Ogden, *qui tam, &c. againſt* Kennett. Caſe 173.

DEBT for twenty pounds a month, &c. on the ſtatute 23 *Eliz. c.* 1. of recuſancy.

If a *recuſant* conform before *judgment* on a *qui tam* action he is diſcharged from the penalty.

The queſtion was, if a ſubmiſſion and conformity will ſerve as well on a *qui tam*, &c. as on indictment.

See 4 *Leon.* 54. 1 *Roll Rep.* 95. *Sheile qui tam v. Foſter.* (*a*) An information againſt *Fenton*, (*b*) look the caſe of *Peters qui tam v. White*, (*c*) and *Workman qui tam v. Gaylard*, (*d*) and among my

S. C. Raym. 391. 465. S. C. 2 Jones, 137. 11 Co. 57. Dyer, 160. 3 Bulſt. 87. 1 Hawk. P. C. 20.

(*a*) 2 Bulſt 323 Hob 204.
(*b*) 3 Keb. 527.
(*c*) Poſt, 238.
(*d*) Poſt, 331.

arguments;

OGDEN v. KENNET.

arguments; in both which cauſes I was of counſel; in the firſt for the plaintiff, in the latter for the defendant.

Adjornatur. (*e*)

(*e*) The whole Court agreed that the action was diſcharged by the defendant conforming; and that by the proviſo in the ſtatute 1 Jac. 4. he was releaſed from the penalty, for the plaintiff acquired no debt or duty until judgment, S. C. Raym. 466.

Caſe 174. Brook *againſt* Miller.

In trover, demand and refuſal is only *evidence* of converſion.
Ante, 161.
Moor, 841.
Godb. 210.
Hob. 287.
Hutt. 10.
2 Mod. 245.
3 Mod. 426.
6 Mod. 212.
2 Salk. 655.
1 Vin. Abr. 242.

ERROR on a judgment in *trover* in an inferior court. There was a ſpecial verdict, that the plaintiff's horſe came to the defendant's hands, and that the plaintiff demanded of him the horſe, and the defendant delivered him not but refuſed; *et ſi, &c.* and judgment is there for the plaintiff.

NOW RESOLVED here, that the jury not having found any *converſion*, the judgment ought to be reverſed; for though demand and denial be evidence of a converſion, and ſufficient inducement to the jury to find a converſion, yet that of itſelf is not a converſion.

Judgment reverſed. (*a*)

(*a*) See 10 Co. 56 and 57. a. Ante, page 161. caſe 148. Eaſon v. Newman, Cro. Eliz. 495. Bruen v. Roe, 1 Sid. 264. Beckworth v. Elvey, Clayt. 112. Morris v. Page and Harwood, 3 Burr. 1243. 1423. Roys v. Johnſton and Dawſon, 5 Burr. 2826. Anonymous, 2 Salk. 655. 1 Ld. Ray. 752.

Caſe 175. Plory *againſt* Bluett.

Venire facias devilla S. is good.

ERROR in a judgment in the court of *Southampton.*

FIRST, The declaration was of an *aſſumpſit apud villam et com' Southampton*, and the *venire facias* only *de villa Southampton*, but held good enough.

Venire facias directed to SERJEANT AT MACE, without ſaying *miniſter cur'*, is good.

SECONDLY, *Venire facias* was directed to the ſerjeant of the mace, and does not ſay *miniſter cur'*; but becauſe the ſame man and ſame officer * was laid to be ſo before; they held it well enough.

* [180]

THIRDLY, "*Scire poſſit*" inſtead of *poterit*; well enough.

And judgment was affirmed.

Tyler

Tyler *againſt* Bendlowe.

Caſe 176.

INDEBITATUS ASSUMPSIT, but "*in conſideratione inde*" left out; and held well enough, for it being well alledged that he was indebted, the law raiſes the promiſe, and they could not but intend it to be *in conſideration* of that debt; for it is ſaid, that being ſo indebted he did afterwards aſſume upon himſelf.

A declaration in *aſſumpſit* upon an *implied promiſe* is good, though "*in conſideratione inde*" be omitted.

Hard. 3. 1 Lev. 88. Cro. Eliz. 149.

But the *venire facias* was *duodecem*, &c. whereas thirteen perſons were ſworn, AND HELD naught: and for this error judgment was reverſed.

Venire facias. Ante, 59.

Mercer *againſt* Southwell.

Caſe 177.

CASE on the cuſtom of merchants againſt the drawer of a bill of exchange. Demurrer to the declaration.

In an action on the caſe *quod cum* is ſufficiently direct and poſitive; but not in treſpaſs *vi et armis*.

FIRST, It is with a *quod cum* which is argumentative and no direct averment. *Sed non allocatur*, becauſe it is an action on the caſe; but it would be otherwiſe if it had been treſpaſs *vi et armis*. (*a*)

Ante, 27. Poſt, 295. 447.

SECONDLY, Becauſe it ſays only that the party to whom it was directed did not accept it, but does not ſay that it was ſhewn or tendered to him.

A declaration on a bill of exchange againſt the *drawer* muſt ſtate that it was *tendered* to the *acceptor*, and that he refuſed to accept it.

And as to this exception it was held naught, for elſe it would be in the plaintiff's power to charge the drawer, when perhaps the perſon on whom, &c. was ready to pay the money according to the tenor of the bill, if it had been tendered to him; although the cuſtom was laid to be among merchants thus, that if not accepted it ſhould charge the drawer. (*b*)

Poſt, 236. 422. 437. 441. 494. Dougl. 55 679. 1 Term Rep. 167.

Judgment for the defendant.

(*a*) See Cro. Eliz. 507. Noy. 58. 2 Bulſt. 215. Fitzg. 256. Salk. 636; but ſee Douglas v. Hall, 1 Wilſon, 99. that a *quod cum* in treſpaſs is well enough after verdict, and White v. Shaw, 2 Wilſ. 203. that when the writ is ſet forth in the declaration, it is good on ſpecial demurrer. See alſo 1 Sid. 150. 187. Cro. Eliz. 185. 1 Lutw. 1509. and Dolly v. Edwards, Stra. 681. 2 Ld. Ray. 1413.

(*b*) It is ſettled that if a bill of exchange be not accepted, an action on the bill will lie immediately againſt the *drawer*, although the time of payment is not come, Milford v. Mayor, Dougl. 54. See alſo 2 Stra. 949. 3 Wilſ. 17. But if the bill be drawn *after ſight* the declaration muſt ſtate a *requeſt* on, and a *refuſal* to accept by, the drawee. Ruſhton v. Aſpinal, Dougl. 679. See alſo 5 Burr. 2671. 2 Term Rep. 713.

Caſe 178.

Cholmely *againſt* Morton.

Michaelmas Term, 33 Car. 2. B. R. Roll 566.

A juſtification to treſpaſs by virtue of proceſs out of a *pie powder* court, muſt ſhew the cauſe of action, and that it aroſe within the juriſdiction of the court.
3 Lev. 141. 243. 404. Lut. 918. Show. C. P. 94. 1 Show. 71. 2 Mod. 195. Ld. Ray. 1530. 1 Salk. 408.

TRESPASS for falſe impriſonment: juſtification by a proceſs out of the *pie powder court* at, &c. and only ſet forth *a plaint* levied and a recovery, but * does not recite the declaration, nor do they ſhew that the cauſe of action aroſe within the juriſdiction.

FIRST, If it be out of their juriſdiction, then all is void, and it is no juſtification; whereas if they had a juriſdiction, although the proceſs be erroneous the impriſonment will be juſtifiable, (*a*) as in the *Marſhalſea caſe*, 10 *Rep.*

THE COURT agreed that if two men make a contract for land in a fair, that cannot be within their juriſdiction, and they ought not to hold plea of ſuch a contract, but only of buying and ſelling goods in the fair.

5 Com Dig. "Pleader," (3. M. 24.) Cowp. 18. 1 Term Rep. 151. 3 Term Rep. 183.

* [181]

Juſtification under proceſs from a court of *pie powder*, ſtating it to be held before the mayor, is bad.
2 Jones, 165.

SECONDLY, They lay the court to be held before THE MAYOR, and that cannot be as mayor; for though *a mayor* may be *ſteward*, yet in that caſe he ought to be laid ſo.—THE COURT agreed that the mayor, if owner of the fair, cannot be a good ſteward of it.

3 Lev. 141. 243. Lut. 918. 1457. 1464. Caſes T. H. 298.

Treſpaſs *vi et armis* alledged by a *quod cum* is bad; and not helped by a juſtification.
S. C. 2 Jones, 197.
Ante, 27. 179. Poſt, 295.
2 Lev. 206.

MR. HOLT then took exceptions to their declaration, that it was not *pro eo quod* but *quod cum*, which in treſpaſs is naught.

MR. POLLEXFEN anſwered, that their plea of juſtification, which is a confeſſion of the fact, helps it; as when a *venue* is wanting in a declaration, if a releaſe be pleaded in bar with a *venue* that helps it; (*ſed quære*, if it will help it on a demurrer, for it is moſt true, that the plea helps it if iſſue be taken on the releaſe). Beſides, here the *quod cum* is only to the plaint: and then it is *necnon* the defendant did impriſon him; which is affirmative and direct.

MR. HOLT replied, That *nec non* there is comparative and copulative, referring only to the firſt, which was by way of recital.

(*a*) See the caſe of Rowland v. Veale, where in a juſtification by *proceſs* out of an inferior court, the plea ſtated "that the plaintiff below levied his plaint in a plea of treſpaſs on the caſe, for a cauſe of action ariſing within the juriſdiction of the court," and held good although it did not ſet forth the *cauſe of action*, or that the defendant became indebted within the juriſdiction, Cowp. 18. Higginſon v. Martin, 2 Mod. 195. Bull. N. P. 83. for the officer is not bound to take notice whether the cauſe of action aroſe out of the juriſdiction, Truſcott v. Carpenter, 1 Ld. Ray. 229. Olliet v. Beſſey, Ante, 148. Poſt, 204.

But PEMBERTON *Chief Juſtice* thought it began a new treſpaſs.

Adjournatur. (*b*)

(*b*) The Court, without regard to *the plea*, gave judgment for the defendant on the defect of the declaration; for by *quod cum* nothing is preciſely alledged, S. C. 2 Jones, 197. But ſee 1 Wilſ. 99. 2 Wilſ. 203. and the note to the caſe of Mercer v. Southwell, Ante, 180.

The King *againſt* Mills. Caſe 179.

Sheriff indicted for refuſing to execute a warrant of juſtices.

INDICTMENT againſt the defendant, being one of the ſheriffs of the city of *Glouceſter*, for neglecting to execute a warrant directed to the two ſheriffs of *Glouceſter*, by three juſtices of the peace out of ſeſſions, for the apprehending of a conſtable who had refuſed to do his office.

Quære, If criminal in the ſheriffs, or if the juſtices ought not to have made their * warrant to other conſtables, ſince *Glouceſter* is but one vill, (*a*) and the conſtable's authority reaches throughout. * [182]

Adjournatur.

(*a*) See Rex v. Gough, Dougl. 791.

The King *againſt* Fownes. Caſe 180.

The omiſſion of naming the magiſtrates, *juſtices of the peace*, in a warrant, is cured by calling them *juſtices* in a return to *habeas corpus*. Cald. 135.

A commitment on the conventicle act, 17 Car. 2. c. 2. muſt ſtate that the party had not taken the oaths. Poſt, 233.

THE defendant being brought hither by *habeas corpus* from *Briſtol gaol*, exceptions were taken to the commitment.

FIRST, That it was by ſeveral men, not naming themſelves juſtices of the peace.

THE COURT. That is helped by the return, in which it is ſaid they were juſtices.

SECONDLY, That it was, for that being at a conventicle, and taken preaching in a borough which ſent burgeſſes to parliament, they committed him to gaol for ſix months; and does not ſay he had not taken the oaths, which commitment muſt be on the *Oxford act* (*a*) againſt diſſenters living within five miles of a corporation, which is on their refuſal to take the oaths.

This exception was allowed, and he was diſcharged on my motion.

(*a*) 17 Car. 2. c. 2. ſ. 3; but this clauſe is altered by the 1 Will. & Mary, ſeſſ. 1. c. 18. ſ. 8; and ſee 22 Car. 2. c. 1. and 5 Geo. 1. c. 6.

Caſe 181. Richardſon *againſt* ———

A defendant removed by *habeas corpus* from an inferior court ſhall put in *common* or *ſpecial* bail, in the court above, according as he would have been obliged to do in the court below.

UPON motion it was agreed, that a man may be removed hither upon *habeas corpus*, having been arreſted by proceſs out of an inferior court, and that formerly in all ſuch caſes he ought to put in *ſpecial bail* here: but now only in ſuch caſes where the ſame cauſe of action would have required ſpecial bail in the courts above; and if it be under ten pounds or the like, (*a*) then only *common bail* to be, though removed by *habeas corpus*. ——— Tidd's Pract. 179.

In what manner bail were formerly liable. Poſt, 335. 4 Inſt. 179. Cro. Jac. 449. 1 Mod. 16. 1 Com. Dig. "Bail," (M.)

ALSO, that bail on a *cepi corpus* formerly was an appearance for all manner of actions that term, and the bail were chargeable with the ſame: (*b*) and now in caſe a man be bail on a *cepi corpus*, and a declaration is delivered *by the bye* againſt him, the bail are chargeable to that action as well as to the firſt: but if ſuch declaration be delivered againſt him and another, (*c*) then the bail are not chargeable.

* [183]

* One comes in upon a *bill of Middleſex*, and another upon *a latitat*, and both of them are bound to B. he may declare againſt both; but the bail is only for his own principal.

Bail on a *cepi corpus* are only liable for the ſum indorſed on the writ, and an *habeas corpus* to thoſe actions only that are returned. 2 Bulſt. 286. Cro. Jac. 363. Yelv. 120.

BUT NOTE, By a new rule of court the bail ſhall be only liable for that action upon which the arreſt was, or if removed by *habeas corpus*, on thoſe actions that are returned, and not to any other, (*d*) but it ſhall be an appearance for the principal himſelf, to charge him with any ſuch declaration *by the bye*, and the bail ſhall be liable only for that ſum mentioned in the writ: as if a man be arreſted for a hundred pounds, and the declaration be for eight hundred pounds, the bail are only liable for a hundred pounds. So ruled by LORD JEFFERIES and the reſt, &c. (*e*)

(*a*) See Gilbert's Pract. 35. 12 Geo. 1. c. 29. ſ. 3. and 19 Geo. 3. c. 70. ſ. 6. and Tidd's Pract. 122. 179.

(*b*) 2 Bulſt. 232. Cro. Jac. 449. Cro. Car. 481. 2 Salk. 564.

(*c*) 2 Jones, 188.

(*d*) See rule Hilary Term, 2 Jac. 2. Tidd's Pract. 181.

(*e*) See the caſe of Barber v. Edwards, Poſt, 335. Martin v. Moor, Stra. 922. 1 Com. Dig. 690. *notis.*

Caſe 182. Anonymous.

The court will not, after *iſſue joined*, allow an amendment in a declaration on a *quantum meruit*. 2 Term Rep. 783.

UPON a *quantum meruit* brought by a ſurgeon for a cure, this court will never grant leave to ſtrike ſo much out of the declaration, and the plaintiff to proceed for the reſt at the peril of coſts. They will do it where the damages are certain, and the action in nature of *a debt* or *contract*, but not in other caſes; and they ſaid he might as well do it in caſe for *words* as in the principal caſe.—AND NOTE, they will never do it after iſſue joined.

Anonymous.

Anonymous. Caſe 183.

MANDAMUS was to ſwear *an alderman:* they return that he was a maintainer and frequenter of conventicles, &c.

THE COURT much doubted if good becauſe too general; but agreed, that where the conviction would be a diſability, a return of that thing or cauſe without mentioning any conviction is a good return, for that it muſt be proved in an action on the caſe for a falſe return.

Where a conviction diſables a man from holding an office, return to a *mandamus* of the *cauſe* without ſtating the conviction is good.

5 Mod. 318. 1 Salk. 432. Ld. Ray. 1564. Stra. 1023. 2 Burr. 999. 4 Burr. 2041.

*[184]

* Anonymous. Caſe 184.

BY PEMBERTON *Chief Juſtice.* An *indebitatus aſſumpſit* will lie for meat and drink for a baſtard child. And it was ſaid by the counſel to be my LORD HALE's opinion, that where there was common charity and a charge it would lie. And undoubtedly a *ſpecial promiſe* would reach it; but then that would be within the ſtatute 29 *Car.* 2. *c.* 3. of frauds, &c. as a *collateral promiſe.*

A ſpecial promiſe to pay for neceſſaries furniſhed to a *baſtard child* or to a *common charity* is within the ſtatute of frauds.——Cowp. 227. 1 Com. Dig. 209. 2 Term Rep. 80.

Anonymous. Caſe 185.

IT was ſaid in this caſe, that the churchwardens have a right to the church yard, and not to the church, for the parſon only has that, although here about *London* the churchwardens take money for breaking open the ground in the churches, and the parſon only for the chancel.

The freehold of the church yard is in the parſon; but by cuſtom it may belong to the churchwardens.

And NOTE, By *Spelman* it is but of late years that they have buried in churches ſo commonly as now.

Cro. Jac. 367. Sed. vide 2 Roll Abr. 377. and 8vo. edit. 657.

1 Woodeſon's Lectures, 313. 3 Com. Dig

Anonymous.

AGREED by PEMBERTON *Chief Juſtice* in evidence on debt for treble damage for not ſetting out of tithes, that the ſetting them out and taking them away himſelf is not good within the ſtatute 2 & 3 *Edw.* 6. *c.* 15. otherwiſe if they are taken away by a ſtranger.

Tithes not ſet out.

Carth. 8.

Caſe 186. Chapman *againſt* Sharpe.

The widow of a copyholder entitled to dower cannot bring *ejectment* for a third part until dower be aſſigned in the manor court, unleſs there is a *cuſtom* to have a third part.

EJECTMENT. Trial at *Chelmsford* this Lent aſſizes before PEMBERTON *Chief Juſtice*, and reſolved by him, that an ejectment will not lie for a third part of a copyhold tenement in nature of dower; for they ought to levy a plaint in nature of a writ of dower in the manor court, and the homage to ſever and ſet out the ſame; but if the cuſtom had been for the widow to have the third part, not in nature of dower, but in common with the heir, it were then otherwiſe.

4 Co. 30. Moor, 410. Cro. Eliz. 426. 3 Com. Dig. "Copyhold," (K. 2.)

Caſe 187. * Noell *againſt* Reynolds.

*[185]

Money loſt at one ſitting, though to ſeveral perſons, is within 16 Car. 2. c. 2.

Ante, 82.

ASSUMPSIT for money won at play: reſolved by PEMBERTON *Chief Juſtice* at the ſame aſſizes, that if above an hundred pounds be loſt upon tick at one ſitting, although to ſeveral perſons, yet it is void by the ſtatute 16 *Car.* 2. *c.* 7. *ſ.* 3. of gaming; otherwiſe if at ſeveral times.

N. Lut. 59. 2 Bl. Rep. 1226.

Caſe 188. Peirſon *againſt* Sorrel.

A deviſe of legacies, and in caſe of non-payment the legatees to enter on ſuch land, and enjoy the profits till ſatisfied.

EJECTMENT at the ſame aſſizes: held by PEMBERTON *Chief Juſtice*, if legacies be given by will, "and that, in caſe "of non-payment, the legatees may enter and enjoy the profits of "ſuch and ſuch land till ſatisfied;" no *demand* is neceſſary; for it is no *forfeiture*, but an *executory deviſe*, although there be a place and time appointed for payment, &c. So was the caſe of *Tyrrel v. Claſſick* here.

1 Roll Abr. 411. Moor, 644. Cro. Eliz. 833. 920. 1 Peer Wms. 478. Dougl. 340. 509.

Eaſter

Eaſter Term,

The Thirty-fourth of Charles the Second,

IN

THE KING's BENCH.

Sir FRANCIS PEMBERTON, *Knt. Chief Juſtice.*

Sir THOMAS JONES, *Knt.*
Sir WILLIAM DOLBEN, *Knt.*
Sir THOMAS RAYMOND, *Knt.*
} *Juſtices.*

Sir ROBERT SAWYER, *Knt. Attorney General.*

Sir FRANCIS WINNINGTON, *Knt. Solicitor General.*

Herring *againſt* Browne. Caſe 189.

EJECTMENT. On a ſpecial verdict, the caſe was; A. and B. are tenants in common. A. makes a ſettlement with a power of revocation by deed indented, and ſigned by two or more witneſſes. A. levies a fine, and afterwards, by deed indented *, ſigned by two witneſſes, he declares the uſes of the fine new and different from thoſe of the ſettlement; and the jury find the fine to be levied with an intention to make partition between A. and B. and to the uſes declared in the new indenture.

If one of two tenants in common make a ſettlement with a power to revoke the ſame by deed indented and ſigned by two witneſſes, A FINE levied, and A DEED indented, ſigned by two witneſſes (though made *ten days* after the fine levied) declaring the uſes of the new fine different from thoſe in the ſettlement,

The queſtion was, whether this were a good revocation, or whether the fine were an extinguiſhment of the power?

MR. BONYTHON *for the plaintiff* argued that the revocation is good; for that if by a deed circumſtantiated according to the power, new uſes be declared, it ſhall be a revocation, though there be no mention made of an intention

with intent to make partition, is a good execution of the power; for the fine and the deed ſhall be conſidered as one conveyance.——S. C. 1 Vent. 368. 371. S. C. Carth. 22. S. C. Skin. 35. 52. 71. 184. 187. S. C. Comb. 11.

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to revoke; and it will alter them though the deed be upon another conſideration. (*a*) And here it was found that the fine was levied with an intention to make a partition, and to the uſes of this ſubſequent indenture: an indenture ſubſequent to a fine will declare the uſes of it. (*b*) Then in the caſe of *Nixon v. Garrett*, in this court (*c*) the deed was firſt and the fine afterwards, and adjudged that the deed and fine was an execution of the power; though the deed alone had not been a revocation, yet both together make it ſo. (*d*)

MR. HOLT *è contra*. The fine and deed ſubſequent cannot be a revocation according to the power; for firſt conſider the fine alone, and what relation it has to the power of revocation; the fine being levied before the deed, and no deed being at the time of levying the fine, it produces two effects: firſt, it is a forfeiture of his eſtate for life, he being but barely tenant for life, and an immediate right is given to him in remainder. Secondly, It is an extinguiſhment of the power, for by virtue of the fine the power of revocation is gone; as are the caſes *Albany v. Grendon* (*e*) and *Diggs v. Palmer*. (*f*) And as to the intention of the parties that is nothing; for an intention is not to be purſued by illegal means. In *Sir Moyle Finch's caſe* (*g*) the ſeverance of the demeſnes there was but for an inſtant, * and the intention of the parties was otherwiſe; and when once there is a forfeiture it can never be retrieved, *Co. Lit.* 202. 253. So that here was a time when there was no power left: there can be no pretence put on *Scroope's caſe*, (*h*) becauſe there are new uſes raiſed; but this deed does not raiſe the uſes, they are raiſed before; the deed is only to declare them. In the caſe *Atwaters v. But*, (*i*) if a man once levy a fine, he cannot limit any new uſes but what are raiſed by the fine. The deed itſelf does not raiſe or pretend to raiſe any new uſes, but only recites a fine levied to the uſe of *Sir John Williams* and his heirs. (*k*) In the caſe of *Nixon v. Garret*, at the time of the deed there was a power extant in being; but otherwiſe in our caſe.

* [187]

Adjournatur.

WILLIAMS in Trinity Term following argued for the plaintiff, that a power of revocation is always favourably taken for the perſon whoſe eſtate it was. *Hob.* 312. If there be any inconſiſtency between the firſt eſtate and the laſt, though there be no words of re-

(*a*) Scroop's caſe, 10 Co. 143. Kibbit v. Lee, Hob. 312.

(*b*) Downman's caſe, 9 Co. 8. 1 And. 145. Moor, 191. Cromwell's caſe, 2 Co. 69. Albany's caſe, 1 Co. Digby's caſe, 1 Co. 3 Bulſt. 256. 2 And. 72. 1 And. 162.

(*c*) Int. Trinity Term, 26 Car. 2. Roll 960. in the King's Bench: reported under the title of Wigſon v. Gerrard, Raym. 239. 2 Lev. 149. Skin. 35. 1 Vent. 278. and 3 Keb. 366. 489. 519. 536. 572.

(*d*) See Owen v. Mannington, 1 And. 162.

(*e*) 1 Co. 110. S. C. Moor, 605. 16 Viner Abr. 494. c. 3.

(*f*) 1 Co. 173. S. C. Moor. 603. Hughes Ent. 185.

(*g*) 6 Co. 63. S. C. 2 Leon. 134.

(*h*) 10 Co. 143. Skin. 205.

(*i*) Cro. Eliz. 856.

(*k*) 2 Roll Abr. 795.

vocation,

vocation, yet it will be ſo: I confeſs that circumſtances and the forms of the power muſt be obſerved: this power is as general as any whatſoever; if the old deed be determined then there is no need of any more; the mean remainders are deſtroyed by death without iſſue, and if the laſt be deſtroyed there is a plain title for us: had there been no fine in this caſe, the deed executed according as the power of revocation requires, would have been ſufficient for us: this is a caſe of conſtruction, and every one may apprehend that he intended this fine as an execution of his power. And I take it all but as one aſſurance, and the fine but a part of it: now to conſtrue part an extinguiſhment, and the deed afterwards to be a revocation, is ſomewhat ſtrained: the deed is between the ſame parties, and of the ſame eſtate; and it is a common practice to acknowledge a fine, and afterwards at leiſure to execute the deed of uſes: and it is found expreſsly, that the fine was levied for the making of partition, and alſo to and for the uſes in the deed mentioned, and that this * was the meaning of the parties; and likewiſe found negatively, that there was no other uſe of the fine. OBJECTION. Take the fine apart and it is an extinguiſhment; but I anſwer, they are not diſtinct, but the ſame aſſurance. OBJECTION. When a power of revocation is once extinguiſhed, it can never be revived: but I ſay it is not extinguiſhed, and being but one conveyance, the intent governs both. OBJECTION. A ſubſequent deed cannot raiſe a uſe, though it may declare one; I conceive it may, the intent of the fine being to this purpoſe; however it is not neceſſary it ſhould be ſo: obſerve the conſequence of this; if it were an extinguiſhment, then it were a forfeiture. (*l*) In *Dowman's caſe*, (*m*) there is no ſpecial finding of the intention of the parties, as there is here. If a man agree to levy a fine, the uſe may be declared by word of mouth; the fine is the ſuperior act, and draws the deed to it; the agreement is the thing, the intention governs all: then he cited the *Earl of Leiceſter's caſe* between *Nixon* and *Garret*; there was a power of revocation; *the Earl* covenants to levy a fine to other uſes, and afterwards the fine was levied; and there SIR WILLIAM JONES argued as they do now in this caſe, but ruled however to be a revocation: if this fine had been general, perhaps it might have been an extinguiſhment, the court perhaps might have conſtrued it ſo; but here is an intention found to limit new uſes.

* [188]

MR. SAUNDERS *è contra* for the defendant. It does appear that at the firſt they were tenants in common in fee, and that the fine was levied to make a partition, and I hope your lordſhip will not conſtrue it ſo; and if this be not conſtrued a partition, then all *Sir John Williams*'s ſtatutes and recognizances will bind a moiety of the other's eſtate ſtill: the common way is to levy a fine to truſtees, and to declare the uſes ſeverally; and it is doubted whether they can do otherwiſe: by the common law they were not compellable to make partition, and they are ſeiſed of ſeveral freeholds, and one will not paſs to the other without livery; ſo that here is a partition made:

(*l*) Dyer, 136. (*m*) 9 Co. 1. 7 Hughes Ent. 11. And. 176.

then

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* [189]

then * I conceive here is no revocation; for by the fine (were there no more in the caſe) this power would be extinguiſhed; here was a fine levied and a time when there was no deed, and how was it then? Suppoſe *Sir John* had an eſtate greater than for his own life, and had then died before any deed made, the power had been gone: in the *Earl of Leiceſter's caſe*, the deed was precedent and purſuant to all the powers of revocation while the party had his power not extinguiſhed; if there had been no deed made there had been the ſame uſes as now, the fine being levied by *Sir John Williams*, to the uſe of himſelf and his heirs; and yet without ſuch deed it would have been no revocation: in *Dowman's caſe* they ſay, that a declaration of uſes may come after a fine, and be ſufficient, if there be no mean eſtates or intereſt to be defeated: relation or fiction is always to uphold a right, and never to defeat one; (*n*) if they will have it as one conveyance they can have it only as relating and ſuppoſed to be made at the time of the fine: and where will they terminate at what time a deed ſhall relate? If ſix months it may be ſeven years after; and ſuppoſe it ſo, yet, according to them, it ſhall relate to make but one common conveyance: here was the caſe of *Bury v. Bowyer*, (*o*) whether an aſſignment of lands by commiſſioners ſhould paſs only from the inrolment, and not from the deed; for there being no time limited when it ſhould be inrolled, it might be inrolled ſome years after and yet relate to the deed, which they would not allow of: they rely much upon the intention of the parties, and I agree it to be of weight; but there is not one word or ſyllable that it was the intention of the parties to revoke the uſes, but only to have a fee; and the fine wrought that as much without the deed as with it. If this deed ſhould work by way of revocation, it is all one whether he in remainder had entered for a forfeiture, yea or no; for this relation would have diveſted him.

THE LORD CHIEF JUSTICE. You cannot ſay he did not intend to revoke when he did intend to limit new uſes.

Adjournatur.

Relation. Vide ante, Caſe 142.

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*SIR FRANCIS WINNINGTON, in Michaelmas Term following argued it again for the plaintiff much to the ſame effect with the former, but inſiſted more on the law of relations, and ſaid, that if the fine and deed are to be conſtrued ſeparately, then it would be againſt us: the true intention of the parties is to make but one ſettlement; the law makes a ſtrain to follow the intention, but never to deſtroy it: he cited *Sir Rowland Hayward's caſe*, (*p*) the judgment ought to be upon the intire act. *Ceſar v. Brook.* (*q*) If a deed of feoffment be at one time, and livery at another, yet all ſhall be conſtrued together as one act: it ought to be reckoned but as one

(*n*) 3 Co. 30. 2 Roll Rep. 502.

(*o*) Benis v. Bowyer, Ante, page 156. pl. 142.

(*p*) 2 Co. 35. S. C. Poph. 95. S. C. 2 Anderſ. 202.

(*q*) Trinity Term, 11 Jac. 1. in Hughes Abr. title "Wills."

a u rance,

aſſurance, for it is no more. (*r*) In ſome caſes the law will find out an intention to make a conveyance good, as in the caſe of *Colgate v. Blithe* (*s*), and *Lord Cromwell's caſe* (*t*), and the caſe of *Snape v. Turton* (*u*). The law will not judge by parcels, but after all the act is done, the law will judge and make conſtruction upon the whole.

MR. POLLEXFEN *è contra*. I agree that to make a revocation they need not mention or take notice of the power, but a conveyance to contrary uſes will amount to a revocation; the fine of itſelf has none of the qualifications mentioned and required in the power: it is the fine alone that makes the conveyance; the deed is not part or parcel thereof, and conveys nothing: theſe uſes did and muſt ariſe at the time of levying the fine, and could not ariſe *in futuro*; it cannot be ſuſpended in any ſort; the uſe of a fine requires neither deed nor parol to raiſe it: it is true, the jury have found that the fine was levied to the uſes in the indenture, which makes neither one way nor other; if it have any influence it will be for us, *viz.* that at the time of the fine theſe uſes were raiſed, and the intention governs all, the jury have found the ſame; and ſo it was by their finding a perfect conveyance at that time: now a fine to ſuch uſes is no revocation; and the jury have not found that the parties at the time of levying * the fine did intend to make ſuch an indenture, but only that the fine was to ſuch uſes: *Dowman's caſe* (*w*), when a recovery is had, the parties cannot declare a uſe *ex poſt facto*, and if there had been the word "then," it would have been all void: all that is ſubſequent is but a recital of their thoughts. Suppoſe there had been only a parol declaration, would that have done it: the conveyance was fully ended before this deed came, the uſe muſt ariſe then; it cannot ariſe by this deed which could not ſpeak before it was made. A ſecond reaſon that I obſerve in this caſe is, that the fine had deſtroyed this power. Suppoſe that after the fine levied and before the deed, *Sir John Williams* had made a deed, and expreſsly revoked theſe uſes, and afterwards had by deed declared the uſes of the fine, your lordſhip would have conſtrued this deed of expreſs revocation to have been void: now if after this fine he could not expreſsly revoke, how could he then by implication and conſtruction make a revocation: In *Digge's caſe* (*x*) there are two things conſiderable, FIRST, By the deſtruction of the eſtate the power of revocation is gone. SECONDLY, If there be two things requiſite to execute the power, and between theſe two things comes a fine, the power is deſtroyed.

* [191]

(*r*) Year Book, 10. 19 Hen. 8. 12.

(*s*) 1 Anderſ. 164. S. C. 2 Co. 57. under the name of Beckwith's caſe. S. C. Moor, 196. S. C. 3 Leon. 160. 260. S. C. Gouldſb. 12. 67. S. C. 4 Leon. 88.

(*t*) Cromwel v. Andrews, 2 Co. 69. S. C. Moor, 471. S. C. Jenk. 252. S. C. 2 Anderſ. 69. S. C. Savil, 115. and Co. Lit. 103.

(*u*) Cro. Car. 472. S. C. 1 Jones, 392. S. C. 2 Roll Abr. 215. 262. 701.

(*w*) Dolman v. Vavaſor, Moor 191. S. C. 1 Anderſ. 25. But ſee Dowman's caſe, 9 Co. 7. Hughes's Ent. 11. Lilly's Ent. 111.

(*x*) 1 Co. 173. Moor, 603. Hughes's Ent. 185.

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A THIRD REASON is this, that there is no time limited how long after he may declare uſes; then according to this he may do it at any time during his life: in *Dyer* 136, (*y*) it was four years after the fine: now what a myſterious conſequence this may have! Suppoſe he in remainder had entered for a forfeiture, and made conveyances and ſettlements; all the counſel in *England* would have reckoned them good, the fine being no revocation, but rather an extinguiſhment; and yet after all this here might be a declaration of uſes, and ſo a revocation; beſides, here is no caſe where the eſtate of a ſtranger was concerned, that deeds and acts ſhould be conſtrued to relate to deſtroy ſuch eſtate; here the eſtates of thoſe in remainder are ſo: then for a man to forfeit his eſtate, and afterwards by his own act to avoid or defeat the forfeiture, is hard to
* [192] ſuppoſe: *Lady Baltinglaſſe v. Temple* (*z*), ſhe being tenant * for life ſuffers a recovery, this is a forfeiture; and although ſhe afterwards reverſed this recovery by writ of error, yet it continued a forfeiture; relation ſhall never work a wrong: for the caſe of *Nixſon v. Garret* (*a*), it is nothing to the purpoſe, for the deed was precedent, and the deed raiſed the uſes of the fine, and the fine, though it conveyed the land, yet it did not raiſe the uſes, the deed did it: in ours it is quite contrary; by the fine here is a perfect conveyance, and here is the eſtate of the conuſor deſtroyed before the deed came, and the intereſt of the remainder-man to enter was veſted before the deed came: and that itſelf was a new caſe, although I queſtion not the law thereof, yet they then took a difference between that uſe and this, both bar and bench did ſo; now when they of the other ſide ſay it is one conveyance, I know not what they mean; the deed after is no conveyance, nor part of it, it is only the putting into writing on parchment the uſes which the fine raiſed by way of memorandum: all their caſes are where there were two parts to be executed, and one is done before the other, there it ſhall relate; becauſe that which was done was imperfect: but what is all that to our caſe, where the conveyance was perfect before: in *Cromwell's caſe* (*b*), which they ſo much inſiſt on, they were conveyances made between the parties, and none of them affected any ſtranger as in this caſe it does; here is ſomewhat comes afterwards which is no conveyance, nor part or parcel of the conveyance; all the diſcourſe about fraction is wide from the point.

THE LORD CHIEF JUSTICE. Suppoſe that after the fine there had been an attainder of treaſon, and after that a deed: Suppoſe a man levies a fine and then marries, and then declares the uſe: in *Hinde's caſe* (*c*), a bargain and ſale, and then a fine, and then inrolment, if the bargain and ſale and fine were but one conveyance, all would paſs by the fine.

Adjournatur.

(*y*) Baſſett's caſe, Dyer, 136.
(*z*) 1 Freem. 956.
(*a*) Ray. 239. 2 Lev. 149. Skin. 35. 1 Vent 278. and 3 Keb. 366 489. 510. 536. 572.
(*b*) Cromwell v. Andrews, 2 Co. 69. Moor, 471. Jenk. 252. Ander. 69. Savil, 115. Co. Lit. 103.
(*c*) 4 Co. 70. 1 Ander. 285. Hughes's Ent. 395.

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It was argued again afterwards by the ſame counſel upon the death and change of judges, and afterwards * in Lord Jefferies's time by Mr. Solicitor General and Mr. Serjeant Pemberton (*d*).

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(*d*) *Ventris* reports, that after many ſolemn arguments it was reſolved in Hilary Term, 1 Jac. 2. by Herbert *Chief Juſtice*, Holloway and Wright *Juſtices*, againſt the opinion of Wythens *Juſtice*, that *the fine* was an extinguiſhment of *the power*, and the deed came too late. S. C. 1 Vent. 371. Wythens *Juſtice* held that the fine and deed ſhould, in favour of common aſſurances, be conſidered as a conveyance. S. C. Comb. 12. But judgment was given for the defendant, S. C. Skin. 187. A writ of error, however, was brought in the Exchequer Chamber, and in Hilary Term, 3 & 4 Jac. 2. this judgment was reverſed by *ſix judges* againſt *two*, S. C. Carth. 22. to 25. and reſolved that the fine and deed (though ſubſequent) was but as one conveyance, and therefore were a good execution of the power, a good revocation of the former uſes, and a good declaration of the new ones. S. C. cited in Tomlinſon v. Dighton, 1 Peer Wms. 169. But ſee Earl of Darlington v. Pultney, Cowp. 260. that if the ſpecific nature of the inſtrument by which the power is to be executed be expreſsly mentioned in the inſtrument which creates the power, it cannot be carried into effect by any other mode of conveyance.

The King *againſt* Clerke. Caſe 190.

Overſeers may compel a maſter to take and provide for a pariſh apprentice.

ORDER of ſeſſions quaſhed, becauſe the juſtices cannot force a man to take an apprentice againſt his will; and an order of ſeſſions to that purpoſe is void. And here was remembered the caſe of *the King v. Pyne* (*a*) in *Michaelmas Term*, in the twenty-ninth year of *Charles the Second*, in the King's Bench, where an indictment againſt *Pyne* for refuſing to take an apprentice put on him by the pariſh was quaſhed; the Court being then of opinion, that the juſtices of peace cannot force a man to take an apprentice againſt his will; (though if he do take him the ſtatute will be binding both upon the maſter and the ſervant, and his parents) except the party do perſonally occupy huſbandry, and then he is compellable (*b*).

(*a*) 3 Keb. 516. 628. 636. 686. 854.

(*b*) See 3 Keb. 854. 3 Mod. 271. Raym. 66. 177. 1 Sid. 99 & 411. Cart. 116. and 1 Lev. 84. *accordant*. But note, The latter reſolutions in 1 Salk. 67. 1 Show. 76. &c. are *contra*. And the ſtatute 8 & 9 Will. 3. c. 30. ſays expreſsly, "That where any poor children "ſhall be appointed to be bound apprentices, purſuant to the act of 43 Eliz. "c. 2. the perſon ſhall *receive* and *provide* for them, according to the indenture; and on refuſal ſo to do, "and oath thereof made by a church-warden or overſeer before two juſtices, "he ſhall forfeit 10*l.* to be levied by diſtreſs and ſale, to the uſe of the poor of "the pariſh where—ſaving to the parties "their appeal to the next quarter ſeſſions "for that county, whoſe order therein is "to be final." Note *to former edition*. ——But now by the ſtatute 32 Geo. 3. c. 57. the covenants for *maintenance* of pariſh apprentices, with whom no more than five pounds ſhall have been given, ſhall continue in force no longer than *three* months after the *death* of the maſter, and two juſtices may order ſuch apprentices to ſerve the remainder of their time with another maſter, under the proviſions preſcribed in the act. See Mr. Conſt's edit. of Bott's Poor Laws, 537 to 563. and Appendix, page 639.

Caſe 191.

Bettiſon *againſt* Ellwayes.

Hilary Term, 32 & 33 *Car.* 2. *B. R. Roll* 548.

Qu. If there be huſband and wife tenants in ſpecial tail for the jointure of the wife, and after the death of the huſband the iſſue in tail levy a fine to a ſtranger, whether a leaſe for years made by the wife is good after her death, againſt the conuſee of the fine.

S. C. Skin. 31. 36.
1 Roll Abr. 349.
Moor, 250.
3 Co. 51.
Jenk. 6.
2 Leon. 168.
Cro. Eliz. 513. 524.
Plowd. 300.
Cro. Car. 244.
2 Vern. 489.
Cro. Jac. 692.

EJECTMENT. The caſe was, huſband and wife ten ſpecial tail for the jointure of the wife; the huſband dies, ing iſſue by his wife two daughters, who levy a fine; th makes a * leaſe for ſixty years.

The queſtion was, Whether this leaſe be void and with ſtatutes of 11 *Hen.* 7. *c.* 20. and 32 *Hen.* 8. *c.* 36. *ſ.* 2. ?

MR. HOLT. The ſtatute diſables any tenant in tail after bility of iſſue extinct, or tenant in dower, or for life, of the ſion of the huſband, and leaves them juſt as bare tenant for life wherever the tenant for life takes upon himſelf to have the e of the whole eſtate, and diſaffirms the reverſion to be in hi has the reverſion or remainder, and affirms it to be in a ſtr this is a forfeiture of his eſtate: the objection here is, becau no diſcontinuance or diveſting of the eſtate; a bargain and no diſcontinuance, and yet may bar the iſſue. A long leaſ alienation in mortmain, becauſe within the ſame miſchief (*a*). ceptance of a fine with render to a ſtranger for a hundred was reſolved within the ſtatute (*b*), and an avoidance of the eſtate by the ſtatute. Threeſcore years poſſeſſion is a bar higheſt action (*c*), that is but a writ of right by the ſtatute o tations.

MR. POLLEXFEN *è contra*. All agree the mother tenant (notwithſtanding the ſtatute) as to all purpoſes but alienation if tenant in tail make a leaſe, the iſſue may affirm or avoid the and therefore there was no reaſon why a leaſe for years rai deed ſhould be within the ſtatute: the caſes which MR. Ho are plainly within the miſchief of the ſtatute, for there the iſſ bound and could never avoid the leaſe, being by fine *ſur g render*, and the iſſue being barred by them they are plainly the ſtatute, and there is no other within it; ſo does a leaſe ſays the *caſe of Sir George Browne*, becauſe the words "any "diſcontinuance" is within it. I think that if the wife had g a rent by fine out of the lands, it would have been an alienation the ſtatute, ſo as to be avoided (*d*). The length of the term thing; for a leaſe for twenty-one years, if by fine, woul within it: ſuch an eſtate as this cannot be within the miſchi cauſe without the help of this ſtatute it might be avoided iſſue; here is the alienee of the iſſue which was never thou by the law-makers; we extend the words of a ſtatute many

* [194]

* [195]

(*a*) 3 Keb. 4. 13, 14.
(*b*) See the caſe of Pigott v. Palmer, Moor, 250.
(*c*) Parker v. Taylor, 2 Leon. Co. 90. 1 And. 60.
(*d*) 1 Jones, 60. Bridg. 57 ton,

to prevent the miſchief intended by the ſtatute to be remedied, but never farther than the miſchief which they intended to prevent (*e*).

(*e*) SKINNER reports, 'that judgment *nisi* was ordered for *the defendant* in Michaelmas Term following; and that "*per* "TREVOR the Court ſaid, that no leaſe, "though for five hundred years, created "by a feme jointreſs, by deed, is a for-"feiture, becauſe the heir might avoid "it;" but he adds, "*quod ego non me-*"*mini.*" S. C. Skin. 36.

Owen's Caſe. Caſe 192.

PROHIBITION. There was a ſuit for tithes, and a prohibition granted hence upon a ſuggeſtion of the lands being barren and newly improved.

On a trial in prohibition if lands be found to be *not barren*, and a conſultation be awarded in a ſuit for tithes of ſuch land, and the ſpiritual court proceed contrary to the verdict at law, *a prohibition* ſhall go, though after ſentence. Ante, 92.

Hereupon a trial is had on a declaration on the prohibition, and a verdict for the parſon, that the lands were not barren; and thereupon there is *a conſultation*, and he proceeding there, gets a ſentence; from thence there is an appeal to THE ARCHES, and there they enter an allegation that the land is barren; and the court there is proceeding to repeal the ſentence becauſe barren land; though contrary to the verdict at law.

And upon all this matter THE COURT grants a prohibition, *quoad* the allegation of barren land (*a*).

(*a*) See ante Tomlinſon v. Freeman, *a prohibition* granted after ſentence and appeal, it appearing upon the libel itſelf, that the cauſe was without the juriſdiction of the Court, Ante, 145. S. P. 2 Roll Abr. 318. 1 Salk. 548. 2 Burr. 813. Cowp. 424. 1 Term Rep. 3. Bunb. 81. 1 Term Rep. 552. B. R. H. 317; but if the want of juriſdiction do not appear on the face of the libel, the court will not grant a prohibition *after plea*, Anonymous, Ante, 155. 2 Roll Abr. 319. or ſentence pronounced, 2 Burr. 813. Dougl. 378. unleſs, if ſome temporal matter incidentally ariſe, they refuſe ſuch proof as the temporal courts allow. Cro. Eliz. 666. 1 Show. 173. 161. 3 Mod. 286; but prohibition ſhall not go after ſentence, on account of the ſpiritual court having cognizance of part of the charge only, and not of the reſt. 2 Term Rep. 473.

Scoble *againſt* Skelton. Caſe 193.

TRESPASS for diverting a watercourſe, that time out of mind run to his certain *meſſuage* OR *tenement*; and HELD well enough, becauſe every meſſuage is a tenement.

Treſpaſs for injuring his MESSUAGE *or* TENEMENT, is good. Ante, 30. Poſt, 243. 259.

Then exception was taken, becauſe it was "for him and his ſer-"vants," whereas his ſervants had no eſtate; BUT HELD well enough.

Surpluſage ſhould be rejected.

Then it was urged, That he preſcribed in a *que eſtate*, and that

On pleading a preſcription in *que eſtate*, the pleader muſt ſtate a ſeiſin *in fee*. ——— S. C. 2 Mod. 318. S. C. Skin. 36. Poſt, 484. 1 Mod. 231. 2 Mod. 143. 1 Lev. 190. 2 Salk. 562. 5 Mod. 150.

he

Scoble v. Skelton.

he says only *seisitus est*, and does not say *in feodo*, whereas he ought to alledge a continuing estate to make a prescription. *Co. Lit.* 121. —Stayed till moved on the other side (*a*).

(*a*) S. C. Skin. 36. says that judgment was arrested for not shewing *how seised*; for unless he was seised *in fee* he could not prescribe; and that upon the case being moved again, the Court held their former opinion. See also S. P. Down v. Gashford, Com. Rep. 43. S. P. Pepin v. Bustine, Ante 81.

Case 194.

* [196]

* The King *against* Vaughan.

An indictment on 3 Jac. 1. c. 4. reciting that the defendant *refused the oath*, is good, although the statute is, "refuses *to take* the oath."

ERROR on a judgment of *præmunire* for refusing the oaths, by 3 *Jac.* I. *c.* 4. reciting the statute, "That whosoever refuses to take the oath, *&c.*" (*a*) and does not say *recusavit præstare sacrament'*, (as all the precedents are) but only *recusavit sacrament'*, and it might be he refused to administer the oath: but judgment was affirmed notwithstanding; for that to refuse the oath is to refuse to take it

S. C. Skin. 11.
Ante 158. 1 Mod. 81. 1 Vent. 171. Ray. 212. 374. 2 Saund. 389.

(*a*) This statute, as far as it relates to the taking of the oath, is repealed by 1 Will. & Mary. c. 8. s. 2. See 1 Hawk. P. C. ch. 19. sect. 37. to sect. 44.

Case 195.

Clayton *against* Gillam.

Trespass *quare clausum fregit*, and digging up slates, laid with a *continuando*, is good; for the continuance shall be referred to that trespass, which may be continued.

S. C. 1 Vent. 363.
S. C. 2 Jones, 194.
S. C. 3 Lev. 93.
S. C. Skin. 42.
F. N. B. 91.
2 Roll Abr. 549.
Ray. 396.
1 Sid. 224. 242. 329.
R. Lat. 417.
5 Mod. 179.
Salk. 639.

TRESPASS for breaking open the plaintiff's close, and digging up his slates, &c. with a *continuando transgressionem prædict'*, &c.

Exception was taken to the *continuation*, by Sir Francis Wythens in arrest of judgment.

But held good enough, being general; and the *continuando* may and shall be referred to that which may be a continued trespass. And here was by the court mentioned the case of *Litchfield v. Elliot* (*a*), in this court about logwood; but answered by the Court, that there it was restrained to the throwing so many particular pieces on the ground: and in confirmation of this their resolution was cited the case of *Howel v. Reynolds* (*b*), about four years since in this court, *viz.* Trespass was brought for taking and carrying away oysters *in separali piscaria* of the plaintiff, with a *continuando* as to the taking; and upon motion in arrest of judgment it was held well enough, and that there might be a continuance thereof; and for this was cited an *anonymous case*, 1 *Brownl.* 223. where a *continuando* of 5 Com. Dig. "Pleader", (3 M. 10.)

(*a*) 16 Car. 2. 1 Keb. 786.
(*b*) Easter Term, 30 Car. 2. 1 Vent. 329. 2 Jones, 109

of a treſpaſs was laid, in breaking and entering his houſe for divers days together, which was there objected to be a new treſpaſs every time he * entered the houſe; but the Court held it was well enough, for that the *continuando* was only for aggravation of the damages. And ſee *F. N. B.* 91. *L.* that a *continuando* may be as well for breaking a houſe as for eating of graſs.

* [197]

The Earl of Shaftſbury *againſt* Graham and Craddock. Caſe 196.

CASE in the nature of a conſpiracy laid in *London*, wherein the plaintiff declared, that the defendants did falſly and malicioufly conſpire to cauſe him to be indicted, convicted, condemned, and deſtroyed for high treaſon; and in order thereto did ſolicit and labour one *Wilkinſon*, being in the King's Bench priſon in *Surrey*, to ſwear againſt and charge him with treaſon; and in further proſecution of this their wicked deſign, did cauſe to be drawn and ingroſſed in parchment an indictment, and the ſame did exhibit at THE OLD BAILEY; and did then and there endeavour to prove the contents thereof, &c.

The court will change the *venue* in an action on the caſe in the nature of conſpiracy, if it appear that the plaintiff's intereſt with the ſheriffs of the county in which it is laid, is ſo powerful that an impartial trial is not likely to be had.
S. C. 2 Jones, 192.
S. C. 1 Vent. 363.
S. C. Skin. 40.
Ante, 176.
Poſt, 303.
Carth. 400.
Hard 327.
2 Mod. 271.
1 Wilſ. 298.
Salk. 670.
3 Burr. 1564.
1 Term Rep. 363. 571. 647.
Cowp. 510.

MR. ATTORNEY GENERAL now moved to change the *venue* out of *London*, upon affidavits of the plaintiff's intereſt with the ſheriffs and juries in *London*, and upon the declaration itſelf. And he urged, that in this action the conſpiracy is the principal, ſo that by an artifice this is drawn into *London*; it is not for indicting him, or exhibiting an indictment; it is for conſpiring, ſuborning, and cauſing an indictment to be exhibited, the moſt part whereof is in *Surrey*.

JEFFERIES *Serjeant ad idem.* The common courſe is ſo always, as in caſe of goods bought here and to be delivered at *Exeter*; the plaintiff has his election; yet if he lay it in *London*, as he may, upon affidavit that they were paid for, and that the payment was in *Exeter*, and the witneſſes, to prove ſuch payment, live there, this will be ground enough to change the *venue*; *ut experientia docet*: and ſo the *venue* may be changed, provided there be cauſe, even where the plaintiff otherwiſe has his election; and this is not grounded on any record. In * a tranſitory action the *venue* of it may be altered if there be occaſion; where a record is the whole ground of a man's action, there it is certainly local (*a*), but upon a conſpiracy which is perſonal, it may be brought in any county in *England*, for it is no more than caſe, and the proſecution of an indictment is but aggravation of damages; the conſpiracy is the giſt of the action, and if there were an exhibition or an indictment without a conſpiracy, the defendant muſt be found *not guilty*; and an action of the caſe lies, though no indictment were exhibited if there were a conſpiracy:

* [198]

(*a*) It is ſaid, that the *venue* may be changed in local as well as in tranſitory actions, if the occaſion require it. Loft. 50. 3 Burr. 1333. 2 Bl. Rep. 1030. See 1 Com. Dig. "Action," (N. 13.)

EARL OF SHAFTSBURY & GRAHAM AND CHADDOCK.

and of the indictment a copy is sufficient evidence: and what have the city of *London* to enquire of, but only the conspiracy and the endeavours of subornation, which were all done in *Surrey?*

MR. JONES. If it be in my *Lord Shaftsbury*'s election to lay it in any other county, then surely it may be changed; and if in *London*, you may enquire of the conspiracy in *Surrey*, why may you not in *Surrey* enquire of the indictment in *London?* In the case of the *Lord Gerrard v. Spenser*, my Lord Chief BARON HALE directed a trial at law upon a suit there in equity; and though the lands lay in *Lancashire*, yet he being a man of interest there in that county, my LORD HALE made them turn their *ejectione firmæ* into a feigned issue, to try it in another place for indifference sake: and in my *Lord Shaftsbury*'s own case against *Digby*, the *venue* was so changed by my LORD HALE, and that in case of a *scandalum magnatum*.

BY THE COURT. Here the chief evidence must arise in *Surrey*, VIZ. the conspiracy and labouring; all that is in *London*, and can be enquired of there is the indictment, to which nothing is needful but a copy and one witness to prove it true; and even in a *scandalum magnatum* the *venue* may be changed for unindifferency's sake, though not upon the common affidavit.

And at last after solemn debate the *venue* was changed, which being done, the plaintiff never proceeded (*b*).

(*b*) The changing of a *venue* is in the discretion of the court, under the particular circumstances of each case, Thompson v. Scroggs, Ante 176. See also 1 Term Rep. 781. and as this discretion is always exercised to promote justice, the court in transitory actions will always change the venue when there appears probable grounds to apprehend that a fair, impartial, or at least a satisfactory trial, cannot be had. Mylock v. Saladine, 3 Burr. 1564. Petyt v. Berkley, Cowp. 510. Rex v. Amery, 1 Term Rep. 363. Mayor of Pool v. Bennet, Stra. 874. Mayor of Bristol v. Procter, 1 Wilf. 298.

Case 197.

* [199]

* The King *against* Ripley.

The court will not grant a *melius inquirendum* after an inquisition *super visum corporis* returned, except for corruption in the coroner.

INQUISITION of a *felo de se* returned hither by *certiorari*.

SIR FRANCIS WITHENS moved for a *melius inquirendum*, on affidavit of melancholy and distraction.

But denied; and held by THE COURT not grantable, unless there had been some irregularity in the caption of it.

Cro. Eliz. 371. 1 Mod. 83. 1 Salk. 190. 3 Mod. 80. 100. 2 Hawk. P. C. ch. 9. f. 56. S.C. 2 Jones, 198. S.C. Skin. 45. Stra. 99.

A coroner's inquisition may be removed into the court of King's Bench, and there traversed. 2 Inst. 176. 2 Hale, 67. 2 Hawk. P. C. c. 9. f. 42. and sect. 55.

THE COURT ordered the administrator to traverse the inquisition, as is usual in THE EXCHEQUER in cases of inquests of office;

office; as *talis venit et queritur ſeipſum colore, &c. gravari et minus rite, &c.*

And agreed by all THE BENCH, that he might do ſo; but held by ſome of the bar, that it is not traverſable: upon an action of *trover* for goods of the deceaſed's, it will hold good, and cannot be traverſed.

But DOLBEN *Juſtice* ſaid, That a preſentment in a court-leet by the old books, is not traverſable, but being removed hither by *certiorari* it is every day traverſed (*a*).

The preſentment of a court-leet is traverſable. 1 Salk. 200. Finch. 386. Cowp. 458.

3 Mod. 137.

(*a*) See Rex v. Roupell, Cowp. 458. Rex v. Ritſon, 2 Term Rep. 184.

The King *againſt* Stenhowe. Caſe 198.

MANDAMUS prayed to *the chanter and canons* for admiſſion to *a canon*'s place in a cathedral, by *Dr. Owen.*

A *mandamus* will not lie to the *precentor and canons* to admit a canon to his ſtall in the cathedral, on a cuſtom to chuſe a ſupernumerary when all the ſtalls are full, until a vacancy happens. S. C. Skin. 45. S. C. 2 Jones, 199.

And alledged on his behalf, that to ſuit in court-chriſtian concerning this place, the court of Common Pleas have granted a prohibition as being a lay fee, and therefore no remedy but a *mandamus:* the chapter is to aſſiſt the biſhop in his temporalities, as to the paſſing or granting of eſtates. By the ſtatute *Weſtm.* 1. *cap.* 5. All elections ſhall be free, now this ſtatute reaches to all corporations whatſoever. 2 *Inſt.* 602. And in *Eaſter* Term 1659, in this court *a mandamus* was granted in one *Coxe's caſe.*

E contra urged, That this is not *a dean and chapter*, but *a precentor and canons*, which is purely ſpiritual; in their original inſtitution they were only to ſay prayers: two ſtatutes take notice of them as purely ſpiritual and religious; and here was cited *Daniel Appleford's caſe*, 1 *Mod.* 82.

* THE COURT. As to that of a prohibition it is nothing in the caſe, for if a libel be there about an induction and inſtitution, a *prohibition* lies, but not a *mandamus*; and in many caſes a *prohibition*, but no *mandamus*, will lie: in caſe a college chuſe a fellow during a plenarty, they are not bound by that election, but may chooſe a-new when there is a vacancy, although the uſage be to confirm the ſame, yet it is not done *de jure* (*a*). * [200]

(*a*) The Court gave no opinion whether a *mandamus* will lie for the admiſſion of A CANON, S. C. 2 Jones, 199; but the *mandamus* was refuſed, becauſe it was ſtated that there was a cuſtom in the cathedral to chuſe a *ſupernumerary* when all THE STALLS were full, which the Court held to be ridiculous and void. S. C. Skin. 45. S. C. 2 Jones, 199. It is, however, determined, that a *mandamus* will lie to a dean and chapter to admit a prebendary to his ſtall, Rex v. Dean and Chapter of Norwich, 1 Stra. 159. or to fill up a vacancy among the canons reſidentiary, Biſhop of Chicheſter v. Hanward, 1 Term Rep. 652.

Case 199. Creswick *against* Saunders.

An action of covenant for non-repair brought by an *assignee of the reversion* against the *lessee* must be laid in the county where the estate is situated.

2 Jones, 144. N. Lut. 97. 109. 1 Sid. 401. 1 Saund. 237. 240. 1 Lev. 259. 3 Mod. 338. 1 Salk. 80. 1 Show. 192. Cro. Jac. 142. 3 Term Rep. 393.

THIS was an action of *covenant* for not repairing a house in *Essex*, by an assignee of the reversion, brought in *London*.

HELD it would not lie, there being no privity of contract, that being gone by the assignment, and the plaintiff being entitled thereto, only by reason of his having the land; therefore the action ought to have been brought only in the county where the land lies; and so is the case of *Bord v. Cudmore*, *Cro. Car.* 183. and *Thursby v. Plant*.

The Court will grant a new *writ of enquiry* in an action of covenant for non-repair, if it appear that the damages given are greatly *inferior* to the estimate proved in evidence.

1 Mod. 2. Cowp. 601. 1 Term Rep. 277. 2 Term Rep 113.

Afterwards it being laid in *Essex*, there was judgment by default, and a writ of inquiry issued, on the execution whereof it was sworn by a bricklayer and carpenter, that it could not be put in tenantable repair under one hundred pounds, and yet the jury gave but six pounds damages; and being asked by the sheriff, how they could do so: they replied, they were judges of the damages, and might give but two pence if they pleased, and were not bound to give an account why they did so. All this was proved by affidavit, as also that before the jury was sworn the defendant offered the plaintiff forty pounds to end the business, but that the plaintiff would not accept it.

And upon my motion for the plaintiff, a new writ of enquiry was granted, though at THE BAR it was said to be unusual, it being found for the plaintiff.

Case 200. * Homor *against* Gale.

* [201]

Judgment against a casual ejector is erroneous, unless *bail* be filed.

See the case of Boucher v. Friend, Post, 249.

EJECTMENT for not appearing at the trial to confess lease, entry and ouster, there was judgment against the casual ejector, and upon MY motion set aside, because no bail was filed.

Anonymous.

In ejectment the confession of lease, entry and ouster, supplies the necessity of actual entry.

1 Vent. 332. 353. 1 Sid. 223. 1 Salk. 259. 246. 3 Keb. 218. Run. Eject. 76. Ld. Ray. 751. 3 Burr. 1897.

NOTE, In Hilary Term, 31 & 32 *Car.* 2. in the King's Bench, it was declared by SCROGGS *Chief Justice* to be the opinion of ALL THE JUDGES, that where an entry is required, and even necessary, the confession of lease, entry and ouster supplies it, (though no

actual entry) and this he ſpoke for the ſatisfaction of THE BAR; it having been a queſtion oftentimes upon trials (*a*). HOMOR v. GALE.

(*a*) The confeſſion of leaſe, entry and ouſter, is a ſufficient confeſſion of an entry in all caſes, except to avoid a fine, and in ſuch caſe an *actual entry* is neceſſary, 1 Salk. 246. Ld. Ray. 751. 3 Burr. 1897. 4 & 5 Ann. c. 16. ſ. 16.

The King *againſt* * * * * * Caſe 201.

QUO WARRANTO againſt ſeveral bakers of the county of *Cheſter*, that came in and ſold bread at *Glamerſtone*, nigh the city of *Cheſter*, for ſelling there *extra ſhopam et abſque aliquo mercat' in loco aperto quaſi et tanquam mercat'*. Quo Warranto. 2 Roll Abr. 123. Stra. 1238. Wilſ. 107. 2 Bl. Rep. 116. 4 Term Rep. 777.

RESOLVED not good, becauſe it is no incroachment without a demand of toll, or the like; and if it had been for keeping a market, they would have diſclaimed.

Judgment for the defendants.

And here was cited the caſe of *Toller v. Cooke*, and others, in the caſe of the bakers of *Honiton* and *Ottery* in *Devon.*, in the Exchequer, laſt Trinity Term, and the ſame judgment given.

The King *againſt* Mayor and Burgeſſes of Warwick. Caſe 202.

INDICTMENT for not repairing a way to a church, and ſay, the defendants ought to repair the ſame, but do not ſay *how*, whether by *reaſon of tenure* or otherwiſe (*a*), NAUGHT, becauſe *prima facie* and regularly the pariſh or county ought to do it of common right (*b*). An indictment againſt a borough for not repairing *a way* to a church, muſt ſtate *how* bound to repair,

1 Vent. 90. 2 Saund. 161. Stra. 187. Cowp. 111. 3 Term Rep. 265.

(*a*) Caſes temp. Hard. 105. Andrews, 276. Cowp. 111. 648. 5 Burr. 2700; and Rex v. Hamlet of Penderryn, 2 Term Rep. 513.

(*b*) March, pl. 62. 1 Vent. 90. 1 Burr. 461 and Rex v. Sheffield, 2 Term Rep. 106.

Caſe 203.

* Anonymous.

* [202]

If ſeveral actions be brought againſt an executor, he may confeſs judgment in one, and plead that with "no aſſets *ultra*" in bar to the others.

IN CASE. An executor has three or four bonds againſt him, and they all come to trial at once, being for twenty pounds a-piece; and the executor has *aſſets* to one twenty pounds, yet he ſhall be chargeable to them all, therefore it would have been beſt for him to have confeſſed a judgment to one of them, and *that* he might have pleaded to the other (*a*). ——— 1 Sid.

(*a*) See the caſe of Waters v. Ogden and another, where to debt on a bond againſt the adminiſtrators of the obligor the defendants pleaded *plene adminiſtravit*, except to the value of £.48; and that they had confeſſed *aſſets* to that amount to another action on a bond of the teſtator's of the *ſame term*, and *then depending* againſt them, and held good, Dougl. 453. 455; but they cannot to debt on bond plead a judgment confeſſed on the *preceding day* in the *ſame term* in an action on a ſimple contract, without averring that they had no notice of the bond debts, Sawyer v. Mucer, 1 Term Rep. 690.

Caſe 204.

Anonymous.

Bail may have an eſcape warrant at any time, and may arreſt an abſconding principal in a place otherwiſe privileged from arreſt.

6 Mod. 95. 2 Salk. 626. 2 Ld. Ray. 1028.

LORD CHIEF JUSTICE. Manucaptors are but gaolers *pro tempore*; and in caſe a man abſcond, and his bail cannot find him, they ſhall have a warrant or tipſtaff to take him out of *White Friers*, or other pretended place of privilege (*a*), in order to ſurrender him, becauſe he is a priſoner to the court, and they may call him at pleaſure, &c. But to enable a plaintiff to take a man on *meſne proceſs* they will not grant it; but in caſe *a reſcous* be returned they will. 1 Atk. 239.

(*a*) By 8 & 9 Will. 3. c. 27. the 9 Geo. 1. c. 28. and 11 Geo. 1. c. 22. theſe pretended privileged places are aboliſhed.

Caſe 205.

Anonymous.

Condition and covenant.

LEASE of land paying rent is no *condition*: ſo a power to dig up trees, making up the hedge again is not a condition, but *covenant* lies for not repairing the hedge.

Caſe 206.

Anonymous.

On a judgment in an inferior court, it may be aſſigned for error *in fact* that the cauſe aroſe *extra juriſdictionem*. Com. Rep. 597.

LORD CHIEF JUSTICE ſaid, he thought it aſſignable for error in fact, in a writ of error on a judgment in an inferior court, that the matter aroſe out of the juriſdiction (*a*). ——— 1 Saund. 73. 2 Wilſ. 16. 1 Term Rep. 151.

(*a*) See the caſe of Rowland v. Veale, Cowp. 20.

Anonymous.

* Anonymous. * [203]

IN an inferior court they will have full coſts, though the damages found be under forty ſhillings, for that they are not within the ſtatute 22 & 23 *Car.* 2. *c.* 9. *ſ.* 136. (*a*); for that a writ of enquiry upon judgment by default is not within it (*b*).

The 22 & 23 Car. 2. c. 9. does not extend to inferior courts.

And though the act be temporary as to the *law-duty*, yet it is not ſo as to this proviſion, for the words are not that *the act* ſhall continue in force but for nine years, but only that *the duty* ſhall continue ſo long and no longer. PER TOUT LE COURT.

A ſtatute is not repealed by the expiration of a temporary clauſe.

(*a*) This muſt be underſtood of caſes where the cauſe is removed from the inferior court by *the defendant*; for if by *the plaintiff's* removing the cauſe he entitled himſelf to full coſts, it would enable him to elude the ſtatute, and become only the more vexatious, 4 Mod. 378. notis. 2 Lev. 124. 1 Ld. Ray. 395. 3 Salk. 115. Hullock's Law of Coſts, 45. Tidd's Law of Coſts, 26.

(*b*) See Sheldon v. Ludgate, C. B. Trin. 3 Geo. 1. Bull N. P. 329.

Melhuiſh *againſt* Carneſam. Caſe 207.

ERROR to reverſe a judgment in debt on a bond for performance of covenants; for that, after a *relicta verificatione*, the judgment is entered "*quod capiatur:*" AND HELD naught; and judgment reverſed (*a*).

Judgment, "*quod cap.*" after a *relicta verificat.* is bad.

(*a*) *Sir Edward Coke* ſays, that if a defendant deny his own deed, and it is found againſt him; or if he, *relicta verificatione*, acknowledge the action, he ſhall be *fined* for his falſity, Beecher's caſe, 8 Co. 73. See alſo Moreclack v. Carleton, 2 Saund. 191. Ray. 195. 1 Mod. 73. accordant. But by 16 & 17 Car. 2. c. 8. and 4 & 5 Ann. c. 16. no judgment ſhall be reverſed by entering a *capiatur* inſtead of a *miſericordia*, &c. and by 5 Will. & Mary, c. 12. the writ of *capias pro fine* is taken away in all actions of *treſpaſs, ejectment, aſſault*, and *falſe impriſonment*: and ſee Salk. 54. Carth. 390. Annally's Rep. 72. and 3 Bl. Com. 399. as to the different modes of entering judgment in theſe caſes, in the courts of King's Bench and Common Pleas, 1 Mod. 73. 5th edit. notis.

Smith *againſt* Prickman. Caſe 208.

Eaſter Term, 34 Car. 2. Roll 76.

AUDITA QUERELA on the poor priſoners act: upon demurrer adjudged by THE WHOLE COURT, that a man in execution for five hundred pounds is not to be diſcharged by that act.

Poor priſoners S. C. 2 Jones, 208.

The Thirty-fourth of Charles the Second,

IN

THE KING's BENCH.

Sir FRANCIS PEMBERTON, *Knt. Chief Juſtice.*

Sir THOMAS JONES, *Knt.*
Sir WILLIAM DOLBEN, *Knt.* } *Juſtices.*
Sir THOMAS RAYMOND, *Knt.*

Sir ROBERT SAWYER, *Knt. Attorney General.*
Sir FRANCIS WINNINGTON, *Knt. Solicitor General.*

Smallwood *againſt* Berthouſe.

Caſe 209.

TREMAINE moved for *a prohibition*; for that the eccleſiaſtical court allowed a will to be proved, and the party but ſixteen years of age; upon a ſuggeſtion that by our law he could make none till ſeventeen years old; he urged *Co. Lit.* and *Pigott's caſe*, 5 *Co.* 29. that an adminiſtration *durante minore ætate* was determined at ſeventeen years of age.

The ordinary is the proper judge of the age at which a perſon may make a will.

1 Salk. 39. 44. Raym. 84. 1 Sid. 162. 2 Salk. 625. 6 Mod. 260. Lutw. 199. S.C. 2 Mod. 315. S. C. 2 Jones, 210.

But after ſolemn debate it was denied, for that they are proper judges thereof, and an appeal lay to the delegates; and whatſoever our law books ſay concerning it, it is only as directed by their law.

Oliet

Caſe 210. Oliet *againſt* Beſſey.

Eaſter Term, 31 Car. 2. C. B. Roll 382.

False impriſonment will not lie againſt a gaoler for detaining a priſoner under a legal warrant, although the arreſt was illegally made.——S. C. Ante 148. S. C. 2 Jones 214. S. C. Ray. 421. 467. Cowp. 476. 3 Term Rep. 183.

TRESPASS for falſe impriſonment *quouſque finem fecerit.* ARGUED, that the gaoler is liable, for that he may bring his action againſt the bailiff as well as the plaintiff. (*a*)

An action of eſcape will not lie againſt the officer of an inferior court if the cauſe of action did not ariſe within the juriſdiction.

And a caſe was cited to have been in the Common Pleas where eſcape was brought for one in execution, and a ſpecial verdict found the whole proceedings in an inferior court, *viz.* declaration on bond, and laid to be ſealed and delivered *infra juriſdictionem* Cur', and *non eſt factum* pleaded, * and verdict and judgment for the plaintiff, and the party taken in execution and permitted to eſcape; but alſo they found that the bond was ſealed and delivered *extra juriſdictionem, &c.* And, upon this verdict, on ſolemn debate, there was judgment againſt the plaintiff. (*b*)

* [205]

To treſpaſs of falſe impriſonment for non-payment of *a fine*, if the defendant juſtify he muſt anſwer the fine.

THEN EXCEPTION was taken to the defendant's plea, becauſe he pleads that by virtue of ſuch proceſs he was taken and brought to his priſon, and detained ſo long, and *not guilty* to all the reſt; whereas here is no anſwer to the fine.

LORD CHIEF JUSTISE. The *quouſque finem fecit* is but for aggravation of damages, and generally laid without time or place.

Adjournatur. (*c*)

(*a*) For the opinion of the Court upon this point of the caſe, ſee S. C. Ante 148. notis.

(*b*) This ſeems to be the caſe of Squib v. Hole, 2 Mod. 29, 30. But ſee Higginſon v. Sheafe, and Moravia v. Sloper, Comy. Rep. 153. and 574. 8vo. edit. Trincot v. Carpenter, 1 Ld. Ray. 229. and Higginſon v. Hadley, Bull. N. P. 83.

(*c*) In S. C. Ray. 470. it appears that the Court were unanimouſly of opinion, that the plea was good notwithſtanding this exception. But in S. C. 2 Jones 215. that the plea was held ill becauſe the defendant did not ſpecially anſwer *the fine*, and that therefore the judgment given for the plaintiff in the Common Pleas was affirmed. But ſee 12 Viner Abr. 219.

Caſe 211. The King *againſt* Spiller and his Wife.

King's Bench, Eaſter Term, 34 Car. 2. Crown ſide.

Indictment for recuſancy, or not coming to church. *Vide ante* caſe 145. *poſt*, 216. 340.

AD generalem ſeſſionem pacis pro com. civit. EXON *apud Guihald ibidem tent. tertio die Octobris anno regni domini noſtri* CAROLI SECUNDI *nunc regis Angliæ, &c.* 33. *Civitas* EXON. ſſ. JURATORES *pro domino rege ſuper ſacrament. ſuum præſentant quod* WILLIELMUS SPILLER *nuper de paroch. beatæ Mariæ major. in com. civitat.* EXON *prædict. aromat. et* AGNES *uxor ejus quinto die Septembris*

anno regni dom. noſtri Caroli ſecundi dei gratia Angliæ Scotiæ Franciæ et Hiberniæ regis fidei defenſor, &c. 33. fuer. et uterque eor. fuit ætatis ſexedecim annor. et amplius et ab eodem quinto die Septembris anno 33 ſupradict. non acceſſerunt nec eorum aliquis acceſſit (ANGLICE *did not repair*) *ad eccleſiam ſuam parochialem beatæ Mariæ major. prædict. nec ad aliquam aliam eccleſiam capellam aut uſualem locum communis præcationis nec ibidem morat. fuer. nec alter eor. ibidem moratus fuit tempore communis præcationis ibidem ad aliquod tempus infra unum menſem integrum extunc proxime ſequent. ſed abſtinuerunt et uterque eor. abſtinuit ab eiſdem* (ANGLICE *have forborne the ſame*) *per præd. ſpatium præd. unius integri menſis contra formam ſtatut. in hujus modi caſu edit. et proviſ. et contra pacem dict. domini regis nunc coronam et dignitat. ſuas et in perniciosum exemplum aliorum in tali caſu delinquentium.*

* Which indictment I MOVED might be quaſhed for theſe exceptions. * [206]

FIRST, To the caption for it is ſaid to be at a *general ſeſſions* of the peace, and does not ſay *quarter* as it ought to do, *Taylor's caſe, Palmer* 44. *Steven Burton's caſe, Style* 123. *ſed non allocabatur per Cur'*, for they would intend at a *quarter ſeſſions*, being held after *Michaelmas*, for the county; and it was ſaid "at the general ſeſſions", and by ſome held, that it need not be a quarter ſeſſions; for an indictment may be at any ſeſſions for that offence; *ſed quære* the ſtatutes.

An indictment on 23 Eliz. c. 1. ſ. 9. at a *general ſeſſions* ſhall, if after *Michaelmas*, be intended a general *quarter ſeſſions*.

Salk. 483. Carth. 455. 3 Term Rep. 496

THE SECOND EXCEPTION I took was to the concluſion, it ſaying *contra formam ſtatut.* and does not ſay which or what ſtatute: but THE COURT held that well enough, for though one ſtatute create an offence, and another ſtatute give a greater penalty, yet *ſtatut.* with a daſh was well enough, and might be *ſtatutorum* as well as *ſtatuti*. *See Moon's caſe, Cro. Jac.* 142. where it is held that *ſtatuti* was good enough.

Indictment framed on ſeveral ſtatutes, concluding *contra formam ſtatut.* is good. Cro. Eliz. 750. Yelv. 116. Cro. Jac. 187. 2 Hale. 173.

Allen 50. 2 Leon. 5. 1 Mod. 191. 6 Mod. 140. Stra. 602. 843. 1066. Ld. Raym. 1518. Dougl. 425. 2 Hawk. P. C. ch. 25. ſ. 117.

THE THIRD EXCEPTION was to the body of the indictment, for the offence by the ſtatute 23 *Eliz. c.* 1. *ſ.* 5. is a *month's* abſence from church; which being a penal law, ought to be reckoned calendar months; and ſo is intended where the matter expoſes the party to a miſchief or penalty, as the ſtatute of *Weſtminſter* the ſecond, *cap.* 5. for the account of lapſe; and the 2 & 3 *Edw.* 6. *c.* 11. for proving a ſuggeſtion.

The time of a month intended by 23 Eliz. c. 1. ſ. 5. ſhall be computed by days allowing *twenty-eight* to the month.

But THE COURT held twenty-eight days or a lunary month was intended by this ſtatute, and ſo well enough; and the rather, becauſe coming to church once in four *Sundays*, or on holydays within the month, was the thing required by this law, and the forbearance ſo to do is the offence; and they ſaid, it had been ſo adjudged, that a lunary month was here intended, and this frequently reſolved.

Yelv. 100. 2 Roll. Abr. 521. Cro. Eliz. 831. Co. Lit. 135. Hob. 197. 2 Co. 166. 1 Hawk. P. C. ch. 10. ſ. 11.

FOURTHLY,

An indictment on 23 Eliz. c. 1. ſ. 5. taken on 3d October, and charging that the defendant *from* the 5th September preceeding was abſent from church for *one month*, is bad, for both days ſhall be taken *excluſively*.

Ante 160.

* [207]

FOURTHLY, Then I urged that here was not a lunary month, here was but ſix-and-twenty days, for it is ſaid that "*from* the *fifth* day "of *September* in the thirty-third year of *Charles the ſecond*" (which is excluſive of that day) "the defendants nor any or either "of them did not repair to their pariſh church, &c. by the ſpace "of one *whole month*, from thence *next following*, &c." and the indictment is taken before the month is out, *viz.* the 3 *October* 33 *anno*, which day of taking the indictment can never be reckoned one; for * he might go to church the third of *October* after the taking of the indictment.

PEMBERTON *Chief Juſtice.* That is true, neither of thoſe days can be reckoned into the month (*a*) but we do not uſe to quaſh ſuch indictments.

DOLBEN *Juſtice.* Not for any ſmall error or doubtful word, but this can never be made good after a verdict, and therefore it is in vain to put them to try it.

Whereupon it was quaſhed PER CURIAM.

(*a*) But ſee Caſtle v. Burdit, 3 Term Rep. 623.

Caſe 212. The King *againſt* Spiller.

King's Bench, Eaſter Term, 34 Car. 2. Roll. 154. *Crown ſide.*

Indictment for ſlandering the grand jury.

EXON. *ſſ.* MEMORANDUM *quod ad generalem ſeſſionem pacis domini regis in et pro com. civitat.* EXON. *prædict. tent. apud* GUIHALD *ejuſdem civitat. in com. civitat. prædict. die Lunæ in prima ſeptimana poſt feſtum Epiphaniæ,* VIZ. *nono die Januarii anno regni domini noſtri* CAROLI SECUNDI *dei gratia Angliæ Scotiæ Franciæ et Hiberniæ regis fidei defenſor. triceſſimo tertio coram A. B. C. et D. aldermanis dict. civitat. cuſtod. pacis dicti domini regis ac juſticiariis ſuis ad diverſ. felonias tranſgreſſiones et alia malefact. infra com. civitat.* EXON *præd. perpetrat. audiend' et terminand. aſſignat. ſuper ſacrament. L. M. N. &c. gener. exiſtent. probor. et legalium hominum ejuſdem civitat. et comitat. ejuſdem civitat. debite impanellat. jurat. et onerat. ſuper ſacroſancta dei evangelia ad inquirend. præſentand. pro dicto domino rege et corpore com. ejuſdem civitat. de omnibus feloniis tranſgreſſionibus malefactis ac de aliis offenſis et articulis inde quibuſcunque fact. perpetrat. ſine commiſſ. contra pacem dict. domini regis infra eandem civitat. et comitat. ejuſdem civitat. ad eandem generalem ſeſſionem pacis præd. præſentat. exiſtit; quod cum ad generalem ſeſſionem pacis domini regis in et pro com. civitat.* EXON *præd. apud* GUIHALD *ejuſdem civitat. tent. die Lunæ,* VIZ. 3° *die Octobris anno regni domini noſtri* CAROLI SECUNDI *dei gratia Angliæ Scotiæ Franciæ et Hiberniæ regis fidei defenſoris, &c.* 33. *coram A. B. C. et D. aldermanis dict. civitat. et aliis ſociis ſuis alderman. cuſtodibus pacis dict. domini regis ac juſticiariis*

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*juſticiariis ſuis ad diverſ. felonias tranſgr. et alia malefacta infra com. civitat. præd. perpetrat. audiend. et * terminand. aſſignat. quidam L. M. N. &c. gen. exiſtentes probi et legales homines ejuſdem civitat. et com. ejuſdem civitat. fuer. debite impanellat. jurat. et onerat. ſuper ſacroſanctа dei evangelia ad inquirend. et præſentand. pro dict. domino rege et corpore com. ejuſdem civitat. de omnibus feloniis tranſgreſſi nibus malefactis ac de aliis offenſis et articulis inde quibuſcunq; fact. perpetratis ſive commiſſis contra pacem dicti domini regis infra eandem civitat. et comitat. ejuſdem civitat. ad eandem generalem ſeſſionem pacis præd. cumque præfat. jurat. pro dicto domino rege,* VIZ. *L. N. N. &c. ſecund. tenorem et exigentiam ſacramentor. onerum et officiorum ſuorum præd. poſtea ſcil. eodem tertio die Octobris anno triceſſimo tertio ſupradict. ad eandem general. ſeſſionem pacis præd. inquiſiviſſent et præſentaſſent inter alia quendam* WILLIELMUM SPILLER, *nuper de civitat.* EXON *præd. in com. præd. aromatar. pro recuſantia (*ANGLICE *for not coming to church) præd.* WILLIELMUS SPILLER *præmiſſorum et præſentament. præd. ut prefertur non ignarus ſed machinans et malitioſe intendens jurat. præd. L. M. N. &c. in infamiam et ſcandalum inter ligeos dicti domini regis inducere et inferre poſtea ſcilicet* 19° *die Decembris anno ſupradicto vi et armis, &c. apud civitat. Exon præd. in com. civitat. Exon præd. ut pacis dicti domini regis nunc perturbator de præd. L. M. N. &c. jurat. præd. in præſentia et auditu quamplurimorum dict. domini regis nunc ligeorum illicite malicioſe et injurioſe dixit propalavit et alta voce aſſeruit et promulgavit hæc falſa ſcandaloſa contemptuoſa et opprobrioſa Anglicana verba ſequentia* VIDELICET "the laſt grand jury" *(præd. L. M. N. &c. jurat. præd. innuend.)* "that preſented me *(ipſum* WILLIELM. SPILLER *innuend.)* "are damned perjured rogues" *et jurat. pro dicto domino rege ulterius dicunt et præſentant quod præfat. L. M. N. &c. fuer. ultimum magn. jurat. qui preſentaverunt præd.* WILLIELMUM SPILLER *(Anglice* the laſt grand jury that did preſent *præd.* WILLIELMUM SPILLER*) ad grave damnum præd. L. M. N. &c. jurat. præd. in magnam defamationem omnium eorund. jurat. præd. et in malum exemplum omnium alior. ſubditorum dict. domini regis in tali caſu delinquentium in manifeſtum contemptum dicti domini regis nunc legumque ſuarum necnon contra pacem dicti domini regis coron. et dignitat. ſuas, &c.*

This (indictment or preſentment) I MOVED to quaſh, and took theſe following exceptions thereto.

FIRST. It ſet forth, that whereas they had preſented one *William Spiller pro recuſantia (Anglice* for not coming to * church); now recuſancy in legal ſignification is a refuſal of the uſual oaths, and no ways ſignifies a not coming to church; and where the word is true Latin, and has a proper ſignification, *Anglice* another thing is naught; and *Anglices* are only allowed where there is no proper *Latin* word for the *Engliſh*.

* [208]

* [209]

Poſt, 217.

But PER CURIAM. The *Anglice* is ſurpluſage; and ſuppoſing it not it is well enough, for this is only recital; and if it had only ſaid,

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A profecutor being one of the grand jury who found the bill will not invalidate the indictment. 4 Term Rep. 473.

ſaid, "WHEREAS the laſt ſeſſions the grand jury had preſented "ſuch a one," that had been well enough; *ideo non allocatur.*

SECONDLY. As it appears on this very indictment, here are ten of that grand jury that are jurors now, and make this laſt preſentment; they that pretend themſelves aggrieved by theſe pretended words, do find this indictment.

THE COURT. That is nothing, for if a battery be committed on a gentleman, and he the next ſeſſions is of the grand jury, ſurely he and his fellows may preſent the treſpaſſor for the ſame.

It is no objection to an *indictment* that the proſecutor has brought an *action* againſt defendant for ſame cauſe.

THIRDLY. I urged, that theſe very men had brought their ſeveral actions: But to that IT WAS ANSWERED, perhaps the action will not lie: however a man may be indicted and puniſhed that way for the ſame thing for which an action lies; as in caſe of battery or the like.

An indictment charging words to have been ſpoken in *auditu ligeorum* is good.

FOURTHLY. It does not ſay that the words were ſpoken in the hearing of any of the king's ſubjects, but only *ligeorum*, which is a noun adjective, and it being an indictment, ought not to be helped by a *ſubintelligitur ſubditorum*. But ſaid by THE COURT, that *ligeus* ſignifies a liege ſubject when alone.

To ſay, "the "laſt grand "jury that pre- "ſented me are "damned per- "jured rogues" is an indictable ſlander.

FIFTHLY. As to the words themſelves, queſtion if indictable, for they import no crime, though it is laid *ad grave damnum* of the grand jury; they cannot be puniſhed by indictment for perjury if they make a falſe preſentment, nor does an action lie againſt them for ſo doing.

Moor 867. Godb. 242. Het. 173. Cro. Eliz. 305. Hard. 501. 1 Lev. 280.

THE COURT. A grand jury are puniſhable for ſtifling and concealing offences, and not preſenting them, by the ſtatute of 3 *Hen. 7. c.* 1. againſt jurors concealments; and theſe words are certainly criminal, being a ſcandal to the proceedings of juſtice.

In an indictment for ſaying "the "grand jury that "preſented me "are perjured "rogues," it is not neceſſary to aver that the preſentment was found on probable evidence.

* SIXTHLY. They do not ſay that the grand jury were not perjured fellows, or that the firſt preſentment was true, or that it was upon information of witneſſes, or their own knowledge, or with a probable cauſe, or that *Spiller* was a recuſant; ſo that for ought appears the words may be true, and by conſequence no offence.

THE COURT. The words are ſcandalous and an offence, though the preſentment were falſe; for a grand jury ought not to be called "damned perjured rogues," though they had by miſtake or miſinformation made a falſe preſentment.

* [210]

The caption of an indictment found at ſeſſion, ſtyling the juſtices *cuſtodes pacis* is good. 2 Hawk. P. C. ch. 25. ſ. 123.

SEVENTHLY. As to the caption it is ſaid, that thoſe before whom, &c. were *cuſtodes pacis*, and does not ſay they were *juſtices of the peace*, &c. and every conſtable is *cuſtos pacis*, and every good ſubject ought to be *conſervator pacis*, and yet cannot take an indictment.

THE COURT. That is well enough, it is their conſtant ſtyle, and

and they are ſaid to be "the king's juſtices, aſſigned to hear and de- "termine felonies, treſpaſſes, and other miſdemeanors within the "county of the city of *Exon.*"

And the indictment was held good, and my client ordered to traverſe the ſame.

Pigg *againſt* Gardiner. Caſe 213.

ERROR. In caſe judgment be reverſed on a writ of error, a *ſcire facias* lies on ſuggeſtion of a payment of the money condemned by the firſt judgment; and upon two *nihils* returned then reſtitution lies and a writ of execution: though the party plaintiff in the firſt action know nothing of the matter: and the caſe of *Weekes v. Long*, in this court, was agreed to have been ſo.

Scire facias on a judgment reverſed on a ſuggeſtion of payment, on the firſt judgment.

Jones 326. 2 Leon. 77.

Carth. 2. Dyer. 168. 1 Roll. Abr. 899. Cro. Eliz. 416. Clift. 675. Salk. 599. 5 Com. Dig. "Pleader" (3 L. 4.) (3 L. 17.) Cowp. 728.

The King *againſt* Green. Caſe 214.

INDICTMENT for uſing the trade of a baker, not having ſerved ſeven years apprenticeſhip, contrary to 5 *Eliz. c.* 4. and does not ſay that he did not uſe the trade at the time of making the act.

An indictment on 5 Eliz. c. 4. muſt aver that the defendant did not uſe the trade at the time of the act.

S. C. Trem. 6. Ante 155.

And it was quaſhed; but agreed and declared by ALL THE COURT that this exception * ſhould never be allowed for the future; and now they would intend that no man did uſe that trade at that time.

* [211]

Putt *againſt* Royſton. Caſe 215.

Michaelmas Term, 33 Car. 2 Roll

TROVER and converſion for goods. The defendant pleads in bar *treſpaſs* brought for the ſame goods; and that upon *not guilty* pleaded, there was a verdict for the defendant: the plaintiff demurs.

A recovery in an action of *treſpaſs* cannot be pleaded in bar to an action of *trover* though for the ſame taking, except *the property* was determined in the action of treſpaſs.

There was urged *Coke's Entries* (*a*) and *Ferrer's caſe*, (*b*) that if the plea be to the action, and he be barred by judgment upon demurrer, confeſſion, or verdict in a perſonal action, it is a bar for ever. (*c*)

MAYNARD *Serjeant* for the plaintiff. In *Ferrer's caſe*, the property is barred becauſe of the juriſdiction; and therefore the judgment is, that the defendant may juſtify the taking as a heriot; ſo

S. C. Raym. 472. S. C. 2 Mod. 318. S. C. Pollexf. 634. S. C. Skin. 48. 57. S. C. 3 Mod. 1. 2 Roll. Abr. 570. 6 Co. 7. Cro. Eliz. 667. 676. Cro. Jac. 15. Yelv. 84. Lut. 1420. 1 Leon. 313. 3 Leon. 194. 3 Lev. 184. 1 Saund. 91. 98. 1 Salk. 11. 3 Wilſ. 240. 304. 2 Burr. 1010. 3 Burr. 1423. 1 Com. Dig. "Action" (K. 3.)

(*a*) Co. Ent. 38. (*b*) 6 Co. 7. (*c*) Noy. 58.

that

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that it appeared plainly that he had a right, and ſo there is a right adjudged to him; which is as much as a recovery, and that is a bar in any action of no higher nature; but here is only the dint of the action miſtaken.

LORD CHIEF JUSTICE. As to the caſe of *Lacon v. Barnard.* (*d*) I diſlike the pleading in that caſe, and I believe there is none like it now; to come and aver that the reaſon why the jury gave a penny damages was, &c. which is a thing not triable, and YELVERTON *Juſtice* is againſt it.

In *Michaelmas term* following it was argued again.

SAUNDERS *for the plaintiff.* A recovery in *treſpaſs* is a bar in *detinue* or *trover* for the ſame thing; and the reaſon is, becauſe by the damages given the property of the goods is altered, and out of the plaintiff; the recompence being given to him for them in damages: but otherwiſe where a man miſtakes his action; and in the caſe of *Lacon v. Barnard*, where a man brings treſpaſs for taking and driving, and recovers two-pence, he may yet bring *trover*: ſo if treſpaſs be brought *quare cepit et abduxit*, and upon
* [212] not guilty there is a verdict for the defendant,* that is only that he did not take them by way of *treſpaſs*, and it may be he did not ſo, but had them of the plaintiff's own delivery, and ſurely then the plaintiff may demand his goods again. In the caſe of *Sir Humphry Ferrer v. Arden*, (*e*) it is ſaid, that if I deliver goods to keep, and am barred in *treſpaſs*, I may bring *detinue*, and if he may bring *detinue*, then he might bring *trover*; beſides the trover and converſion is laid to be a year after.—But to that it was anſwered by THE COURT, that that is not material.

MR. POLLEXFEN *for the defendant.* If another action of *treſpaſs* had been brought, and the former treſpaſs pleaded in bar, that would be agreed a good plea: then ſuppoſing it ſo, the queſtion is, if it be a good bar in *trover?* when one is barred by judgment, confeſſion, or verdict, he is barred not only in that action, but in every action of that nature, (*f*) as to the caſe of *Lacon v. Barnard*, that is not much to the purpoſe, for that is in caſe of a recovery by the plaintiff: now theſe actions are of the ſame nature, and the variance is only nominal, and the coming of the goods to the defendant's hands is the main matter in both, for damages are to be recovered in both; they are more of the ſame nature than any two actions in the world: If an action of treſpaſs were brought, and then trover in this court, and the treſpaſs pending were pleaded in abatement, I conceive that this would be a good plea. Shew me one caſe where trover will lie and treſpaſs will not. (*g*) I may bring treſpaſs againſt

(*d*) Cro. Car. 35. Hutton 81. Stiles 202.

(*e*) Cro. Eliz. 667.

(*f*) See Bro. Abr. title "Action ſur le "caſe," 110, and the rule in Sparries caſe, 5 Co. 61. "*pro uno debito nemo debet bis "puniri vel vexari.*" See alſo the year book 12 Edw. 4. pl. and Bro. Abr. title "Bar" 111. 4 Co. 43. Co. Lit. 96. 303. Hard. 132. Wingate 695.

(*g*) Co. Lit. 57. a. See Smith v. Mills, 1 Term Rep. 480. Ward v. Macauley, 4 Term R. 489.

a man

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a man for goods come to his hands by my own delivery: when treſpaſs is brought and verdict for the defendant, I conceive that the property is thereby for ever affirmed in the defendant: the judgment is, *nil capiat per billam, et defendens eat inde ſine die*; which diſcharges the party from all actions. By *Higgins's caſe*, (*h*) *tranſit in rem judicatam*, and *finis litium* is the end of the law; and that ſeems to be the reaſon that always governed the judges in this * point: and why ſhould not, in all common juſtice, a verdict for the defendant be as final and concluſive as when for the plaintiff: in the caſe of *Brown v. Wootton*, (*i*) judgment upon a demurrer is concluſive, and what reaſon of difference between a demurrer and a verdict? A verdict is a thing of the higheſt nature for the aſcertaining of truth: here was the caſe of *Turberville v. Savage*, (*k*) aſſault and battery, and *ſon aſſault demeſne* pleaded, and verdict and judgment for the plaintiff; *Savage* goes into the Common Pleas, and brings his action againſt *Turberville*, and he pleads the former action, plea and verdict.

* [213]

LORD CHIEF JUSTICE. I take *Ferrer's caſe* to be good law, and not at all to be ſhaken; and I reckon the difference and reaſon to be this: Where the ſame evidence will maintain one or the other, there without queſtion a bar in the one will be ſo in the other, as in *Ferrer's caſe*; but where the evidence will not, it is otherwiſe. You ſay that *treſpaſs* will lie wherever *trover* will; it is a manifeſt miſtake; (*l*) for *treſpaſs* lies not on a bare denial, as *trover* will on a demand and denial: (*m*) in an action on the *caſe* and in an action of *detinue*, the ſame evidence will maintain both actions, ſo that it is not the action in its own nature, but the evidence that doth ſpecificate them. When a man miſtakes his action it is unreaſonable to ouſt him of any other: in *Ferrer's caſe* the evidence was diſcovered; but here it is generally *not guilty*. Where the verdict is for the plaintiff there the property is altered, becauſe of the recompence given in damages; and you know an accord with ſatisfaction is a good bar, which is not ſo high as a judgment, ſo that the chief buſineſs is the ſatisfaction; but this verdict for the defendant does not alter the property: ſo that I think it no bar; for we muſt intend it a miſtake of the action; and that treſpaſs would not lie, nothing appearing to the contrary.

Judgment for the plaintiff by PEMBERTON *Chief Juſtice*, JONES and RAYMOND *Juſtices*; DOLBEN *Juſtice hæſitante*.

LORD CHIEF JUSTICE. Suppoſe I bring *aſſumpſit* on a bond, would a verdict for the defendant bar me in *debt*? (*n*)

* DOLBEN *Juſtice* anſwered that would be all naught. (*o*)

* [214]

(*h*) 6 Co. 45.
(*i*) Cro. Jac. 73.
(*k*) 1 Mod. 3.
(*l*) 2 Mod. 245. 3 Mod. 2. 6 Mod. 212.
(*m*) But ſee ante, page 161. pl. 148. and the caſe of Brook v. Milner, ante, page 179. pl. 176.
(*n*) See Slade's caſe, 4 Co. 94. and Yelv. 84.
(*o*) See 2 Burr. 1010.

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LORD CHIEF JUSTICE. I agree when the original action is a tortious converſion, there either *treſpaſs* or *trover* will lie, and ſuch matter being diſcloſed, a verdict for the defendant in the one, will be a bar to the other.

Caſe 216. Linch *againſt* Lucey.

A judgment entered "*quod capiatur*" inſtead of "*quod ſit in miſericordia*," by miſtake, may be amended; but if it appear that the judgment was of long ſtanding; that a writ of error is brought; that the judgment was by default; that the writ of enquiry was executed without defence; and that the original cauſe of action was hard and oppreſſive, THE COURT may order the amendment to be altered, and the judgment to be ſet aſide.

1 Roll. Abr. 201.
1 Vent. 217.
Cro. Car. 294.
Cro. Eliz. 609.
1 Sid. 70.
Moor, 869.
3 Mod. 112.
Carth. 167.
Sira. 869.
Ld. Ray. 1570.
Dougl. 116.

CASE for wares ſold. Judgment was entered "*quod capiatur*," inſtead of "*quod ſit in miſericordia*," which was purely the miſtake of the clerk, and therefore a rule was made to amend it on my motion.

And they moved againſt that rule the ſame term, becauſe a *writ of error* was brought, and that they had inſiſted on that error; beſides it was a judgment by default, and a *writ of inquiry* executed without defence, and the original cauſe of action was ill, being a trick on a young heir.

Which motion I DEFENDED upon theſe reaſons, *viz.*

That this court has amended judgments to make them good, but never altered them to vitiate or make them naught; that it has helped errors, but never willingly made them; that the record now is fair and right as it ſhould be: in the uſe of an almanack it has been obſerved as a rule here never to recur thereto for to vacate a judgment, but to ſupport a judgment it is frequently done; if it had been amended without rule of court, the attorney might have been laid by the heels; but it would have been ſaid, as it has been here often by MR. JUSTICE TWISDEN, "bleſſed is the mending hand," and the judgment ſhould have ſtood good; and ſo they amend in the Common Pleas frequently on writs of error brought here: this is not ſo bad as a *diſcontinuance*, or the like; this is your own judgment which you have helped. For the merits of the cauſe that is nothing to the purpoſe now: they might have pleaded to the original action, or defended it in the writ of inquiry if they had ſo pleaſed; now they are too late. The * ſole objection is, its being a judgment of ſo long a ſtanding; and for that the *caſe of Rawlins*, (*a*) is a full anſwer, *a verdict* was there amended three terms after, much more *a judgment* ſhould be ſo; and the record in our caſe is not certified. In the caſe of *Wooden v. Hazell*, (*b*) it is expreſsly reſolved, that there could be no alteration or amendment of a record, but in affirmance of a verdict or judgment, and not in defeaſance of either; that caſe was on an eſſoin; but in caſe of a judgment there is the caſe of *Wheeden v. Sugg*, in *Croke*, (*c*) but there is only the point of law on the demurrer queſtioned, it is in *Roll Abr.* (*d*) where LORD ROLLE ſays, that if a judgment be given againſt the plaintiff on a demurrer, and the judgment be entered thus, that at ſuch a day the plaintiff

* [215]

(*a*) 4 Co. 52. But ſee 2 Term Rep. 707.
(*b*) 1 Leon. 134.
(*c*) Cro. Jac. 372.
(*d*) 1 Roll Abr. 205.

"*quaſtus*

"*exactus non venit ideo nihil capiat per breve*," which is the form of the entry of a nonſuit, and not of a judgment upon a demurrer, this ſhall be amended; becauſe it is the default of the clerk. Now no difference can be aſſigned as to the point of amendment between this caſe and ours. However it being once amended it cannot be altered, unleſs you repent of having given a true judgment, and will deliberately make it erroneous; and ſay, "*defendens quod capiatur*" when it is caſe and no *vi et armis* in the count, and ſo no fine to the king; and therefore not a *capiatur*, and you may ſet it aſide if irregularly obtained; but this judgment was regular.

Notwithſtanding which THE COURT inclined that it might be altered. But on what reaſon I know not, ſave that they thought it a hardſhip upon the defendant, and ſo did not much conſider of it. (*e*)

However at laſt, by conſent, the judgment was ſet aſide; and the defendant pleaded *non aſſumpſit*, &c.

(*e*) It is ſaid that the mis-entry of a *capiatur* inſtead of a *miſericordia* was not amendable at common law, 1 Sid. 70. 3 Mod. 112. But by the ſtatute 16 & 17 Car. 2. c. 8. it is enacted "that no judgment, after verdict, by confeſſion, *cognovit actionem*, or *relicta verificatione*, ſhall "be ſtayed or reverſed, for that a *capiatur* "is entered for a *miſericordia*, or a *miſericordia* for a *capiatur*, or for the want of "either of them." The reaſon therefore why the court inclined to alter the *amendment* in this caſe ſeems to have been, becauſe they diſcovered that it was *a judgment* by *default* and not within this ſtatute. For it was not till the 4 & 5 Ann, c. 16. that the ſtatute of 16 & 17 Car. 2. c. 8. and all the ſtatutes of Jeofails were extended to judgments "by *nihil dicit* or non "*ſum informatus*."

* The King *againſt* Record.

Caſe 217.
* [216]

KING'S BENCH, *Michaelmas Term*, 31 *Car.* 2. *Roll* 111. CROWN SIDE.

PRESENTMENT for a nuiſance in keeping hogs, to the annoyance of the neighbourhood, at a court leet for the manor of *Stepney*.

A preſentment for a nuiſance muſt ſtate the place WHERE, and where that place is ſituated. 2. C. Term. 85.

I MOVED to quaſh it for theſe exceptions, becauſe it was ſaid to be at *Caſtle Lane*, and does not ſay where that is; beſides, it did not ſay where.

And quaſhed PER CURIAM.

Caſe 218. The King *againſt* Eveley and his Wife.

KING'S BENCH, *Trinity Term*, 34 *Car.* 2. *Roll* 35. CROWN SIDE.

The Court will not quaſh an indictment on 23 Eliz. c. 4. for hearing maſs, although it only charge the defendant with *hearing maſs*.

Ante 206, 207.

" MIDDLESEX *to wit.* THE JURORS for our lord the king upon their oath preſent, that *Thomas Eveley*, late of the pariſh of *St. Margaret's Weſtminſter*, in the county of *Middleſex* aforeſaid, yeoman, and *Anne* his wife, on the firſt day of *June*, in the thirty-fourth year of the reign of *Charles* the Second now king of *England*, &c. and divers other days and times as well before as after, at the pariſh of *St. Giles in the Fields*, in the county aforeſaid, unlawfully, unjuſtly, and voluntarily were preſent, and each of them were preſent, and then and there unlawfully, unjuſtly, and voluntarily *audiverunt et uterque eorum audivit maſſam*, ANGLICE *maſs*, in contempt of the law, in evil example of all others in the like caſe offending, and againſt the peace of our lord the king, his crown and dignity, &c. and alſo againſt the form of the ſtatute (*a*) in ſuch caſe made and provided."

To this indictment I took theſe exceptions.

FIRST, It is ſaid they were preſent, and does not ſay with whom, or to what purpoſe, nor is it ſaid that they were preſent on a religious account, or with any prieſt that read it, nor is it ſaid *ea intentione ad audiend.*

The Court would nor quaſh an indictment, for falſe *Latin*, if explained by an *Anglice*.

Ante, 209.

* [217]

SECONDLY, It is ſaid *audiverunt maſſam*, which is no *Latin* word but for *a lump*, and then it is nonſenſe: (*b*) *miſſa* is the true proper word for the ſame, and ſo is *Gouldman's Dictionary*; and the like of *Calvin's Lexicon Juridicum verbo* " *miſſa*," where he quotes divers claſſical and other authors, both lawyers and divines, that that * is the proper word for a ſacrifice; from hence it is plain the *Anglice* cannot help it; for whereſoever the *Engliſh word* has a proper ſignification, and a true *Latin word* to expreſs it by, and the *Latin word* has no colourable ſenſe of that, it is not good; and this is the common rule in conſtruction of *Anglices*; as to ſay *equus*, ANGLICE *a man*, would be ſtark naught; and if the *Anglice* be reckoned ſurpluſage and void, then it is naught certainly, for it is *audivit maſſam*, a lump. (*c*)

(*a*) This ſtatute is the 23 Eliz. c. 4. which impoſes a penalty of 100 marks and a year's impriſonment on every perſon who ſhall *ſay* or *hear* MASS. See alſo 11 & 12 Will. 3. c. 4. which puniſhes a popiſh biſhop or prieſt with perpetual impriſonment for ſaying maſs, except, (being a foreigner, and entered in the ſecretary of ſtate's office) it is performed in the houſe of a foreign miniſter. But by 18 Geo. 3. c. 60. the 11 & 12 Will. 3. c. 4. is repealed, provided ſuch biſhop or prieſt ſhall take the oath there enjoined before he ſhall have been apprehended, or any proſecution commenced.

(*b*) All the indictments are *miſſa*, and ſo is Dyer, 203. & 323, 324.

(*c*) Now by the ſtatutes 4 Geo. 2. c. 26. and 6 Geo. 2. c. 14. all law proceedings are to be in Engliſh. See 2 Hawk. P. C. ch. 25. ſ. 88.

But

But THE COURT would not quaſh it, but bid us demur to it, for that they would not quaſh an indictment for ſuch an offence, no more than they would for *perjury*; (*d*) and bid us try it, or demur at our peril, which we would, &c.

(*d*) That the quaſhing an indictment is *diſcretionary* in the court upon the circumſtances of the caſe, and that they are not bound to quaſh for any inſufficiency, *ex debito juſticiæ*, ſee 1 Sid. 54. 247. Cro. Car. 584. Palm. 389. 1 Salk. 372. Sayer, 27. Stra. 607. 1 Wilſ. 325. 2 Burr. 1127. 1 Bl. Rep. 275. 461. Dougl. 239. 3 Bac. Abr. 116. 1 Term. Rep. 316. and 2 Hawk. P. C. ch. 25. ſ. 146.

The King *againſt* The Dean of Exeter.

Caſe 219.

MANDAMUS prayed, to be reſtored to the place of one of the eight men of *Aſhburton*, in the county of *Devon*.

A ſpecial mandamus granted to reſtore a perſon to a place of one of the "eight men of Aſhburton." S. C. 2 Mod. 316. 3 Bac. Abr. 530.

And urged, that there was a *mandamus* to be ſworn of one of the four-and-twenty men of *Tiverton*, and they have no other name. Theſe eight men make all the rates for the pariſh, and have the poor's ſtock.

PER CURIAM. The truſtee of an hoſpital may in time come and demand a *mandamus* as well as you do here.

But at laſt *a mandamus* was granted, and ordered to make a *ſpecial mandamus*, and to recite therein ſo much of the office as it may appear to be an office; (*a*) otherwiſe it ſhall do you no kindneſs.

(*a*) See 1 Lev. 162. Raym. 152.

Franklyn *againſt* Johnſon.

Caſe 220.

ERROR upon a judgment in *replevin*, wherein the plaintiff was nonſuit, and judgment was "*quod averia præd. ſint irreplegiabilia*," AND HELD naught; for that on this judgment no *ſecond deliverance* can be brought.

No ſecond deliverance on judgment by *nonſuit* in replevin. 4 Term Rep. 509.

* Michaelmas Term,

The Thirty-fourth of Charles the Second,

IN

THE KING's BENCH.

Sir FRANCIS PEMBERTON, *Knt. Chief Juſtice.*

Sir THOMAS JONES, *Knt.*
Sir WILLIAM DOLBEN, *Knt.* } *Juſtices.*
Sir THOMAS RAYMOND, *Knt.*

Sir ROBERT SAWYER, *Knt. Attorney General.*

Sir FRANCIS WINNINGTON, *Knt. Solicitor General.*

The King *againſt* Lord Grey. Caſe 221.

INFORMATION (*a*) againſt him for ſeducing away a daughter of *Lord Berkley*, ſhe being his own wife's ſiſter, and detaining her ſecret in his houſe, and committing fornication with her; and upon a trial at THE BAR he was found guilty.

If a perſon be convicted of *ſecreting another*, and appear in court at the return of *elongavit* to a writ of *homine replegiando*, he may be committed although no *capias in withernam* has iſſued; and he is not entitled to be bailed until he produces the body.

Thereupon he was afterwards proſecuted with a writ *de homine replegiando.*

At the return thereof, he appeared; and prayed his appearance might be recorded; and that he might be admitted to plead and traverſe the return, which was, that he had *eloigned* dame *Henrietta Berkeley* ſo as the ſheriff could not find her.

———S. C. Raym. 473. S. C. 3 H. Tr. 519. 543. Skin. 61. 76. 81. 2 Jones, 236. Salk. 582. Carth. 286. 4 Mod. 183.

(*a*) See the information *verbatim* in the appendix to the 6 vol. of Mr. Hargrave's edit. of State Trials, page 16.

KING v. LORD GREY.

On the other ſide it was prayed that he might be committed, for that in *F. N. B.* 68. it is ſaid, that on a return of an *elongavit* a *capias in withernam* lies to take the body of the defendant, to detain him *quouſque*, &c. be he peer of the realm or common perſon; and in that book is cited the caſe of *Dame Spencer*, (*b*) and a declaration againſt her *in cuſtodia*; and in that caſe is cited one *Matthew Redman's*, in the time of *Richard the Second*, and now his being in court ſupplies a *capias in withernam*.

* [219]

HOLT *é contra*. We come in at the return of the writ and appear, let them declare and we will plead *inſtanter*; *(*c*) and he cited 21 *Edw.* 4. 63, 64. if there were a default it might be as they ſay.

JEFFERIES *Serjeant*. This is not like the caſe of a common *replevin*, he ought to bring in the body.

MR. POLLEXFEN. He is to come in upon a *capias in withernam*, and not before; this is a writ which the law gives to relieve againſt impriſonment, and if it ſhould be otherwiſe then the miſchief would be of our ſide; we muſt lie in your cuſtody till their plea be determined, and then the debate and conteſt muſt be between you the defendant, and we who are in your cuſtody; if he will bring in the body then he ſhall plead: the lord of a manor may plead that the plaintiff is his *villein*, but then he muſt bring in the body firſt.

LORD CHIEF JUSTICE. Now upon this return we find an *elongavit* by my *Lord Grey*, and, upon his appearance, we ſee no need of a *capias* for bail; you remember the *caſe of Wells*, where, upon ſolemn debate, it was denied.

And hereupon the *Lord Grey* was committed: but the LORD CHIEF JUSTICE told him, that if he would ſend for the body *ſedente Cur.* they would admit him to bail.

Qu. Whether to a writ of *homine replegiando*, the ſheriff is bound to return a *cepi corpus* or an *elongavit*; or whether he may not return *non cepit*. Poſt, 232. Carth. 286. Comb. 200. 12 Mod. 36.

Quære. If in ſuch caſe the ſheriff is bound to return *the body* or an *elongavit*, and may not return a *non cepit*? In *Wilmore's caſe* laſt Eaſter term it was ruled that nothing elſe could be returned, and the court refuſed any other return, and forced the ſheriff to return an *elongavit*. But to me ſeems the contrary, for he may return that the defendant claimed him as his *villein*, *F. N. B.* 66. and if he may not return a *non cepit*, then here may be a caſe where a ſheriff cannot make a true return, which ſeems abſurd to affirm; for ſuppoſe ſuch writ be ſued for the body of A. againſt B. who knows nothing of A. nor ever had him in his cuſtody, if the ſheriff cannot make any other return than a *replevin* or an *elongavit*, then he cannot make a true return, and is of neceſſity liable to an action: *ideo quære'* (*d*)

(*b*) Michaelmas Term, 11 Hen. 4. title "Homine replegiando."

(*c*) See Treblecock's caſe, that the ſpecial matter may be pleaded to the writ *de homine replegiando*, 1 Atk. 633.

(*d*) See the caſe of De la Baſtide v. Reynell, 4 Mod. 183. that the ſheriff cannot make any other return to a *homine replegiando* than *elongavit*.

MAYNARD

KING v. LORD GREY. Mainprise.

MAYNARD *Serjeant* the next day comes and moves on the behalf of the *Lord Grey*, that *mainprize* might be taken: this is a rare writ and the courſe is not determined; in king *John's* time we find never a one, * in *Edward* firſt's time but one. (*e*) The party may plead and juſtify, or he may deny the taking. In the reign of *Richard the ſecond* (*f*) there was a writ *de homine replegiando* againſt the *Earl of Warwick*; an *elongavit* was returned; and a *capias* iſſued; and a *ſuperſedeas*, becauſe he had found *mainprize* for the bringing in the body on pain of five hundred pounds. In the reign of *Henry the Fourth* (*g*) one was taken upon a *capias*, and there was a *conceſſum eſt*, that he find mainprize, and he did ſo, and a *ſuperſedeas:* although he be committed for the contempt, yet he may come in and plead. Then for printed caſes, there is the Year Book of *Edward* the fourth, (*h*) and *Raſtal's Entries*, (*i*) he may plead without appearance of the party; there was a prayer to *gage deliverance*, he there found pledges to deliver him, but yet conditionally if he have taken him; and this is declared by VAVASOR to be the opinion of all the judges: here is no conviction, and yet he may plead any thing, here is no *unde queritur*, here is no plaintiff, it is only a *captus eſt ut dicitur*. * [220]

MR. HOLT. The party may be bailed. (*k*) He has liberty to *gage deliverance*, to find *mainprize* if he have taken him; for the having of the body here, the return of the ſheriff (*l*) cannot conclude the merits of the cauſe, nor can he make return againſt the ſuggeſtion of the writ *quod captus eſt:* I find no ſuch return as *non cepit* in a common *replevin*, and then ſurely a man may plead *non cepit*. (*m*)

PEMBERTON *Chief Juſtice*. I do not think you may plead in this caſe, but I do much doubt if he can be bailed; thoſe pleadings you mention are generally on a ſpecial return: and I do yet grant further, that upon ſuch a return as this is there may be pleadings; if he will come and own that he has the party, and juſtify, he may; and ſo it was I ſuppoſe in the caſe of the *Earl of Warwick:* it is the ſame with the caſe of executor; if a ſheriff on a *fieri facias* will return *a devaſtavit*, it is not traverſable, though ſuch a return on a *ſcire facias* with an inquiry be traverſable. I * agree further, that if you bring an action againſt the ſheriff, and he be found guilty of a falſe return we will deliver him; or if you will bring in the body, or if *my Lord* will come in and own the taking, and juſtify the ſame, and give ſecurity to render her, if it be found againſt him, we will bail him. However, let us ſee theſe caſes and we will conſider thereof. * [221]

Afterwards he produced her in court and was bailed.—*See the next caſe.*

(*e*) See Year Book, 18 Edw. 1. pl.
(*f*) In the King's Bench, in Hilary Term, 16 Rich. 2. Roll 16.
(*g*) King's Bench, 15 Hen. 4. Roll 25.
(*h*) 12 Edw. 4. pl.
(*i*) Raſt. Ent. 402.
(*k*) 5 Hen. 7. pl. 3. 13 Hen. 7. pl. 17.
(*l*) Raſtal, 402.
(*m*) 21 Edw. 4. pl. 64. Keilway, 71. Fitz. N. B. 74.

Turbet

Caſe 222.

Turbet *againſt* Daſſigney.

Qu. If a perſon be in execution for a fine on a conviction for a miſdemeanour, and be detained on a *capias in withernam* iſſued againſt him on the return of *elongavit* to a *pluries homine replegiando*, whether on receiving a pardon of the *fine* he can be bailed on the *capias in withernam*.

S. C. Ray. 474. Skin. 47. Comb. 10. See Whitlock's Memoirs, 140. 2 Inſt. 55. 3 Mod. 120. 1 Atk. 633. 4 Com. Dig. "Impriſonment," (L. 4.) Salk. 582.

AN INFORMATION having been ſued againſt *Daſſigney*, for unlawfully carrying the plaintiff *Turbet* to *Jamaica*, in the parts beyond ſeas, he was convicted and fined five hundred pounds. (*a*)

He was likewiſe charged with a *capias in withernam* (being in execution for the ſaid fine by the court of the King's Bench) on the return of an *elongavit* to a *pluries homine replegiando*.

Daſſigney applied himſelf to the king's moſt excellent majeſty for a remiſſion of the ſaid fine; and it was referred to the lords commiſſioners of the treaſury, who made a doubt (ſuppoſing the defendant pardoned his fine) if he be bailable; and thereupon they by letter deſire the LORD CHIEF JUSTICE PEMBERTON's opinion, who deſiring the aſſiſtance of the other judges of the King's Bench, and MR. JUSTICE JONES, DOLBEN and RAYMOND.

SIR FRANCIS WINNINGTON for *Turbett*, MR. THOMPSON and MYSELF for *Daſſigney*.

I ARGUED moſt of what I had before prepared in theſe words: They ſue an *homine replegiando* in the name of the young *Turbett*; and after an *alias* and a *pluries* they get an *elongatus eſt per quendam* PHILIPPUM DASSIGNEY *infra nominat'*. This was to the ſheriff of *London*, whereas the defendant never lived in *London*, but at *Wapping* in *Middleſex*; and this the ſheriff does without ever demanding the body of *Turbett* from the defendant *Daſſigney*, ſo that though it may be a true return, it can never be an honeſt one, for it is not true of his own knowledge; for the ſheriffs of * *London* could not know but that *Daſſigney* might have had the body of *Turbett*, ſo as the ſheriff might have replevied him; and though the conviction in *London* on the information might excuſe him from an action for a falſe return, yet the true and proper return for the ſheriff of *London* to have made (the defendant *Daſſigney* living in *Middleſex*, and now being in the King's Bench) would have been a *non eſt inventus* as to *Daſſigney infra ballivam ſuam*; for ſuppoſe a common replevin were ſued to the ſheriff of *York* for cattle diſtrained by me in *London*, muſt he have returned an *elongat' ſunt* becauſe he could find neither the defendant nor the cattle? He ought to have returned that *nullus ex parte quer' venit ad oſtendend' quæ quot et qualia catalla* of his the defendant had taken. And as to the bail, that it is in the power of this court to take bail: there is no action between ſubject and ſubject, and but one between the king and a ſubject, where before verdict, conviction, or attainder the defendant is not bailable; and in this caſe you may bail him: FOR FIRST, this is an action for the recovery of damages: and SECONDLY, in other actions where the ſuit is *in propriâ perſonâ* as it is here, the defendant is bailable, *Ver-*

* [222]

(*a*) See 11 & 12 Will. 3. c. 7. ſ. 18.

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don the under ſheriff of *Norfolk* was bailed here on an appeal of murder; and ſo it is done every day on appeals of murder, rape, and the like. This court has the largeſt power as to bail of any court in *England*, both in civil and criminal cauſes. THIRDLY, I humbly take it for a rule, that whereſoever the cauſe of a man's lying in priſon may not be true, there he may be bailed, and that although he be in execution; as one in execution of a judgment, on a verdict, for which he brings his attaint; one in execution on a judgment for which he has brought his writ of error; one in execution, and he complains himſelf to be aggrieved thereby, and thereon he brings his *audita querela*; in all theſe caſes the party may be bailed: the caſe of an attaint, &c. is much ſtronger than ours, for there is verdict, judgment, and execution, which my LORD COKE ſays is the end of the law; and yet there when he brings his attaint he is bailable, becauſe then it becomes doubtful if his impriſonment * were on a juſt cauſe: and in our caſe here is nothing but the return of the ſheriff, which is a return impoſſible to be true of his own knowledge. The conviction upon the information is no bar in the way of our being bailed, for in that caſe the preſent plaintiff was no party, nor had any thing to do; the return of the ſheriff is not concluſive, for there is a manifeſt difference between a return of an act done by the ſheriff himſelf, and a matter he is not conuſant of; now as I ſaid before, this cannot be true of his own knowledge: in caſe a *ſcire facias* be brought againſt *terre-tenants*, and the ſheriff returns A. B. and C. *terre-tenants*, they may yet come in and plead a ſpecial *non tenure*; nor does this do the defendant any more miſchief than the return of an *elongavit* in a common *replevin*; for in an *homine replegiando* there may be a *gager of deliverance*. (*b*) One brings treſpaſs upon the caſe, wherein by his count he ſuppoſes himſelf free, and the defendant claims him as his *villein*, ſo that he dares not go abroad, &c. and prays that he might *gage deliverance* of ſome of his goods which he had taken, and that he may find ſecurity not to intermeddle with any of his goods or his body, pending the ſuit: and there it was held that he ſhould *gage deliverance* as in an *homine replegiando*, for the end of both is to try the liberty of the plaintiff; and they all held, that in an *homine replegiando* it ſhould be and was ſo; now it would be a vain thing to lie in cuſtody and yet to *gage deliverance*. In this action upon the interpleading as to the goods a releaſe may be pleaded; and ſo is it in the reign of *Henry the Seventh*. (*c*) Beſides which there is an expreſs caſe in the *Year Book*: (*d*) In a *homine replegiando*, the defendant appears and alledges *villenage* in the plaintiff, and the other ſays he is *frank*, but becauſe it was *a pledge* for him that the plaintiff was not yet delivered, it was prayed for him that he might *gage deliverance*, to which it is ſaid, that the fact might be ſo, that the defendant had not took him; VAVASOR *Juſtice* ſaid it was the opinion of all the juſtices, that he ſhould find pledges to deliver him if he had ſeized him, and if he had not *nulla ſequitur pœna*, and a

* [223]

(*b*) Year Book, 13 Hen. 7. pl. 17.
(*c*) 5 Hen. 7. pl. 3.
(*d*) 12 Edw. 4. pl. 4.

writ

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writ ſhall iſſue to the ſheriff to deliver him if he be detained; here was * no ſpecial return of a claim of *villenage*, for the *villenage* is claimed by the defendant after his appearance; here was interpleadings before the party was delivered; here was a *gager of deliverance*; which were needleſs, thus to put in pledges to diſcharge him if the party muſt lie by it till he be diſcharged. This *withernam* is but proceſs, it is no execution, it is but a means to try a title to liberty, it is not as I find in any of *the Entries*, awarded by the court, but a writ ſued out of courſe, there is not ſo much as a *fiat breve* entered: in moſt other particulars it is as in a common *replevin*, as in that ſo in this, there muſt be pledges found for to proſecute with effect. (*e*) It ought to be before you have a writ to the ſheriff to deliver, &c. In a common *replevin*, the ſheriff may return *a claim of property*; ſo here may he return a *claim of the plaintiff* as his *villein*, and an imparlance lies in this action as in a common replevin. In the ſecond precedent under this title in *Raſtal's Entries*, the abbot's ſervants came *et per attornat. ſuum* claimed *villenage* in the plaintiff to their maſter, and the form of their plea ſhews that they were not in cuſtody in *withernam*, for it is *unde non intendunt aliquam injuriam in hac parte perſonis ſuis aſſignari poſſe, &c.* which by implication argues they had not already ſuſtained puniſhment *in perſonis ſuis*; and this was not on a ſpecial return, but upon an *elongat.* generally. In the former caſe (*f*) there was a count before the delivery. In *Dame Spencer's caſe*, (*g*) and as *Brook* has it (*b*) there were pledges and count before the delivery. There is a record (*i*) where bail was taken and a *ſuperſedeas* to the *capias in withernam*, upon a ſurmiſe of bail put in here above, the tenor whereof follows in theſe words. "INTER * RECORDA *domini regis* "*Richardi Secundi in Theſauro recept. Scaccarii ſui ſub cuſtodia de-* "*minorum commiſſionarior. theſaur. et camerar. ibidem remanent.* VIZ. "*inter placita de tempore regis Richardi ſecundi inter alia ſubcen-* "*tinetur ut ſequitur*, VIZ.

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"*Rotulus placitorum coram domino rege apud Winton*" (which muſt be the court of King's Bench held then in fact before the king; as the ſtyle remains now at this day *ubicunque tunc fuerimus in Anglia*, whereſoever the king then was) "*de termino Sancti Hila-* "*rii anno regni regis Rich. 2. ſextodecimo.*—W. CLOPTON."—— "ADHUC DE TERMINO SANCTI HILLAR.—CORNUB. *ſſ. Dominus* "*rex mandavit vicecom. Cornub. breve ſuum clauſum in hæc verba:* "*Richardus dei gratia rex Angliæ et Franciæ et dominus Hiberniæ* "*vicecom. Cornub. ſalut. cum pluries tibi præceperimus quod juſte et ſine* "*dilatione replegiari facias* DAVID TREGOYES *quem* THOMAS DE "BELLO CAMPO *comes Warr. et* MICHAEL TREWYNNELECK *ce-* "*perunt et captum tenent (ut dicitur) niſi captus eſſet per ſpeciale* "*præceptum noſtrum vel capitalis juſticiarii noſtri vel pro morte ho-* "*minis vel pro foreſta noſtra vel pro aliquo alio recto quare ſecund.*

(*e*) Brook's Abr. "Replevin," 66. 49. from the Year Book, 8 Hen. 4. pl. 2.
(*f*) In the Year Book, 12 Edw. 4. pl. 4.
(*g*) 11 Hen. 4. pl. 15.
(*b*) Bro. Abr. "Replevin," 19.
(*i*) Hilary Term, 16 Rich. 2. Roll 16.

"*conſuetudinem*

" *conſuetudinem Angliæ non ſit replegiabilis vel tu ipſe eſſes coram nobis* TURBET
" *in craſtino animarum ultime præterito ubicunque tunc eſſemus in* v.
" *Anglia oſtenſurus quare mandata noſtra præd. toties tibi inde di-* DASSIGNEY.
" *recta exequi contempſiſti; tuque ad diem illum nobis retornan. quod*
" *præd.* DAVID *elongatus fuit extra ballivam tuam per præd.* THO-
" MAM DE BELLO CAMPO *et* MICHAELEM TREWYNNELECK *ad*
" *loca ignota ita quod viſum præd.* DAVID *habere non potuiſti, ſic nec*
" *corpus præd.* DAVID *replegiari feciſti,* ET IDEO *tibi præcipimus*
" *quod corpus præd.* MICHAELIS *in withernamio capias et eum ſalvo* Capias in withernam.
" *et ſecure in priſona noſtra cuſtodire facias quouſque præd.* DAVID
" *juxta tenorem mandatorum noſtror. prædictor. tibi pluries inde*
" *directorum replegiari voluit præcipimuſq; etiam tibi omnia bona et*
" *catalla terras et tenement. præd. comitis in balliva tua in manus* * [226]
" *noſtras ſeiſiri faceres et ea* * *ſalvo et ſecure cuſtodires quouſque præd.*
" DAVID *permittere replegiari voluerit, et qualiter præcepta noſtra*
" *præd. fueris executus conſtare facias nobis a die Sancti Hillarii in*
" *quindecim dies ubicunque tunc fuerimus in Anglia; ut ulterius ſuper*
" *premiſſis facere valeamus prout de jure et ſecundum legem et conſue-*
" *tudinem regni noſtri Angliæ fore viderimus faciend. Et habeas ibi*
" *tunc hoc breve—Teſte* W. CLOPTON. *apud* EBOR *nono die Novem-*
" *bris anno regni decimo ſexto.*

" INDORSAMENTUM *ejuſdem brevis ſequitur in hæc verba; quoad* Return.
" *capiend.* MICHAELIS *præd. infraſcript. et eum ad cuſtodiam fa-*
" *ciend. in priſona noſtra quouſque replegiari voluerit* DAVID TRE-
" GOYES *et ad ſeiſiri faciend. in manum veſtram omnia bona et catalla*
" *terras et tenement.* THOMÆ DE BELLO CAMPO *comitis Warr.*
" *infraſcript. et ea ſalvo et ſecure cuſtodiend. inde nihil actum eſt ad*
" *præſens, quia* DOMINUS REX *mihi mandavit breve ſuum de ſuperſe-*
" *dend. interim, cujus brevis de executione iſtius brevis ulterius faciend.*
" *ſuperſedi; et eſt breve de ſuperſedend. huic brevi conſut. quod quidem*
" *breve ſequitur in hæc verba* RICHARDUS *dei gratia rex Angliæ et* Writ of ſuperſe-
" *Franciæ et dominus Hiberniæ, vicecom.* CORNUB. *ſalutem, cum* deas, on finding
" *pluries tibi præcepimus quod juſte et ſine dilatione replegiari faceres* ſecurity, &c.
" DAVID TREGOYES *quem* THOMAS DE BELLO CAMPO *comes*
" WARR. *et* MICHAEL TREWYNNELECK *ceperunt et captum te-*
" *nent ut dicitur niſi captus ſit per ſpeciale præceptum noſtrum vel ca-*
" *pitalis juſticiarii noſtri vel pro morte hominis vel pro foreſta noſtra*
" *vel pro aliquo alio recto quare ſecundam conſuetudinem regni Angliæ*
" *non ſit replegiabilis vel cauſam nobis ſignifices quare mandatum noſ-*
" *tram alias tibi inde direct. exequi non potuiſti, ac tu nobis ſignifica-*
" *veris quod præd.* DAVID *elongatus fuit extra ballivam tuam per*
" *prædict. comitem et* MICHAELEM *ad loca ignota ita quod viſum*
" *prædict.* DAVID *habere non potuiſti, ſic nec corpus præd.* DAVID.
" *replegiari feciſti, ſuper quo per breve noſtrum de judicio tibi præcepi-*
" *mus quod corpus prædicti* MICHAELIS, *ſi inventus fuit in balliva*
" *tua caperes in withernamio ac omnia terras et tenement. bona et ca-*
" *talla prædict. comitis in balliva tua in manum noſtrum ſeiſiri ac ea*
" *ſalvo cuſtodiri necnon corpus præd. detineri faceres quouſque præd.*
" DAVID. *ſecundum legem et conſuetudinem regni noſtri Angliæ reple-*
" *giari poſſes juxta tenorem mandatorum noſtrorum tibi prius inde*

" *direct.*

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Manucaptores.

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" *direct. Et qualiter mandat. noſtrum fuiſſes executus ſciri faceres*
" *nobis a die Sancti Hillarii in quindecim dies proxime futur. ubi-*
" *cunque tunc fuerimus in Anglia per literas tuas ſigillat. Jamque*
" JOHANNES DANTRE *de com.* GLOUCEST. *clericus et* ROGERUS *
" ULBAREN *de com.* WARR. *coram nobis in cancellar. noſtra*
" *perſonalit. conſtituti manuceperunt,* VIZ. *uterque eorum corpus pro*
" *corpore ac ſub pœna treſcentar. librar. pro præfat. comite et* MI-
" CHAELE *quod ipſi præfat.* DAVID. *in curia noſtra coram nobis ad*
" *quindena prædict. ubicumque tunc fuerimus in Anglia ad faciend. et*
" *recipiend. quod curia noſtra conſideraverit in hæc parte præceptum*
" *habebunt et paratum, quas quidem treſcentas libras iidem manu-*
" *captores de terris et catallis ejus ad opus noſtrum levari conceſſer.*
" *ſi idem* DAVID *coram nobis ad diem prædict. non venerit in forma*
" *ſupradict. ideo tibi præcipimus quod caption. corporis prædict.*
" MICHAELIS *ac ſeiſinam terrar. et tenementor. bonor. et catallor.*
" *præd. comitis in manum noſtram occaſione præd. faciend. interim*
" *ſuperſedeas, et ſi ipſum* MICHAELEM *ea occaſione ceperis tunc ipſum*
" *a priſona qua ſit detent. ſi ea occaſione et non alia detineat. in*
" *eadem, interim deliberari ac manum noſtram e terris et tenementis*
" *bonis et catallis præd. comitis, ſi per te occaſione præd. et non alia*
" *capta ſunt in manum noſtram, interim amoveri facias per manu-*
" *captionem ſupradict. Et habeas coram nobis tunc hoc breve teſte*
" MEIPSO *apud* EBOR. 24 *Novembris anno regni* 16°.

Delivery of the perſon.

" *Ad quem diem coram* DOMINO REGE *apud* WINTON *venerunt*
" *præd.* COMES *et* MICHAEL *in propriis perſonis ſuis, et hic in cur.*
" *præfatum* DAVID. *duxerunt et Cur. hic deliberaverunt.*

Count.

" *Et præd.* DAVID *inſtanter in propria perſona ſua queritur quod*
" *prædict.* COMES *et* MICHAEL *ſimul cum, &c. die Martis proxime*
" *ante feſtum Sanctæ Mariæ Virginis anno regni regis* 16. *ipſum*
" DAVID. *apud* TREGOYES *in com. præd. ceperunt impriſonaverunt*
" *et ipſum extra comitatum præd. duxerunt et in priſona detinuerunt q*
" *prædict. die Martis uſque ad prefat. quindena Sancti Hillarii unde*
" *dicit quod deteriorat. eſt et damnum habet ad valenciam duarum*
" *mille librarum et inde producit ſectam, &c.*

Plea.

" *Et præd.* COMES *dicit quod præd.* DAVID. *reſpondere non debet*
" *quia dicit quod idem* DAVID *eſt nativus ipſius comitis pertinens ad*
" *manerium ſuum de* CARNAUT *in comitatu præd. et quod ipſe et*
" *omnes anteceſſores ſui domini manerii præd. a tempore quo non*
" *extat memoria ſeiſiti fuerunt de prædict.* DAVID *et anteceſſoribus*
" *ſuis ut de nativis ſuis tanquam pertinentibus ad manerium ſuum*
" *prædict. et petit judicium ſi præd.* DAVID. *in hac caſu reſpondere*
" *debeat, &c.*

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" * *Et prædict.* MICHAEL *defendit omnem injuriam et quicquid, &c.*
" *et dicit quod prædict.* DAVID *eſt nativus præd. comitis pertinens*
" *ad manerium ſuum de* CARNAUT *in com. prædict. et quod idem*
" COMES *et omnes anteceſſores ſui domini manerii prædict. a tempore*
" *quo non extat memoria fuerunt ſeiſit. de prædict.* DAVID. *et ante-*
" *ceſſoribus ſuis ut de nativis ſuis tanquam pertinentibus ad manerium*
" *ſuum prædict. Et pro eo quod idem* DAVID *fuit rebellis et ſe juſti-*
" *ciari*

" *ciari noluit per miniſtros domini comitis idem* MICHAEL *ut ſerviens* TURBET
" *ejuſdem comitis et per præceptum domini comitis ipſum* DAVID. *v.*
" *cepit et impriſonavit prout ei bene licuit, et petit judicium ſi præd.* DASSIGNEY.
" DAVID *actionem ſuam præd. in hac caſu verſus eum manutenere*
" *debeat.*

" *Et idem* DAVID *dicit quod ipſe eſt liber homo et liberæ condi-* Iſſue.
" *tionis et non nativus dicti comitis prout prædict.* COMES *et* MI-
" CHAEL *ſupponunt. Et de hoc ponit ſe ſuper patriam, et prædict.*
" COMES *et* MICHAEL *ſimiliter*, &c.

" IDEO *veniat inde jurata coram domino rege a die Paſchæ in* *Jurat.*
" *tres ſeptimanas ubicunque*, &c. *Et qui nec*, &c. *Idem dies dat. eſt*
" *partibus prædict.* &c.

" ET SUPER HOC *veniunt* JOHANNES TREVERLYN, JOHANNES Pledges *ad proſ.*
" TREMARRAM, ROGERUS INYLL, *et* THOMAS POLSONE, *omnes*
" *de com. Cornub. et manuceperunt habend. corpus præd.* DAVID.
" *coram* DOMINO REGE *ad præfatum terminum et ſic de die in diem*
" *quouſque*, &c. *Et quod idem* DAVID *proſequi debeat præd. placi-*
" *tum modo et feſtino (ſine colluſione fraude et tardatione) quo poterit*
" *in propria perſona ſua de die in diem verſus dict.* COMITEM *et*
" MICHAELEM *de præd. captione corporis ſui quouſque placitum inter*
" *ipſos inde terminetur, et ſi return. corporis præd.* DAVID. *dicto*
" *comiti adjudicetur ſuper placito præd. quod tunc idem* DAVID *ad*
" *poſſeſſionem ipſius comitis ſe reddat et liberabit hic in cur. per præd.*
" *manucaptores tanquam nativus ipſius* COMITIS.

" *Et iidem manucaptores recognoverunt ſe hæredes et executores*
" *ſuos teneri ſolvere præd.* COMITI *et hæredibus ſuis ſexcent. marcas*
" *ſterlingor. ſi præd.* DAVID *et manucaptores ſui præd. omnia et*
" *ſingula non fecerit vel facerent vel quod idem* DAVID *aliquid fecerit*
" *in contrar. aliquorum præd. præmiſſor. et præd. manucap. et quilibet*
" *eorum per ſe conceſſit quod præd. ſumma ſexcentar. marcar. de*
" *terris et catallis ſuis fieri poſſit per vicecom. et præfato* COMITI
" *et hæredibus ſuis liberari*, &c. *Et ſimiliter iidem manucaptores*
" *manuceperunt quod præd.* DAVID *ſe bene geſſerit erga do-*
" *minum regem et populum ſuum et præcipue erga miniſtros et*
" *tenentes præd. comitis* * *quod eis non inferret per ſe nec per alios* * [229]
" *ſuo procuramento aliquod malum de corporibus ſuis ſub pœna ſu-*
" *prædict. Et A. B. C. et D. pro præd.* COMITE *et* MICHAELE
" *quod ipſi per ſe nec per alios per eorum procurationem non impe-*
" *dient nec aliquis eorum impediet præd.* DAVID. *quin ipſe proſecu-*
" *tionem ſuam præd. legitimo modo proſequi poſſit quoquomodo ſub pœna*
" *centum librar.* &c.

" *Et continuato inde proceſſu inter præd.* DAVID. *et præd.*
" COMITEM *et* MICHAELEM *per jurat. poſit. in reſpect. coram*
" *domino rege uſque a die Paſchæ in unum menſem anno regni*
" *regis* RICHARDI SECUNDI *decimo ſeptimo ubicunque*, &c. *pro*
" *defectu jurat'*, &c.

" *Ad quem diem coram* DOMINO REGE *apud Weſtm. venit præd.*
" DAVID *in propria perſona ſua per manucaptionem ſuam præd.*

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" *et præd.* COMES *et* MICHAEL *in propriis perſonis ſuis ſimiliter*
" *veniunt, et jurat. veniunt qui tam de aſſenſu præd.* DAVID. *quam*
" *præd.* COMITIS *et* MICHAELIS *ad hoc electi triati jurat. et dicunt*
" *ſuper ſacramentum ſuum quod præd.* DAVID *eſt liber et homo liberæ*
" *conditionis et non nativus præd. comitis prout præd.* DAVID TRE-
" GOYS *ſuperius allegavit et aſſidunt damna occaſione præd. ad qua-*
" *dragint. libras, &c. Et ſuper hoc conſideratum eſt quod præd.*
" DAVID *recuperet verſus præd.* COMITEM *et* MICHAELEM *damna*
" *ſua præd. ſuperius per jurat. præd. ad* 40 *libras taxat. et quod præd.*
" COMES *et* MICHAEL *capiantur.*"

A copy of which record was produced before THE JUDGES, it thereby appearing that it is in the power of the Court to ſuperſede a *capias in withernam*, upon the giving ſecurity to produce the body of the plaintiff; and although it was to be at the return of the *pluries capias*, yet that alters it not, for he ought to have been produced at firſt; and in our caſe there is a moral impoſſibility to produce this boy under ſix months, he being in the plantation of *Jamaica*, and for that we are ready to give any ſecurity.

Then there is another record in *Mich.* 5 *Hen.* 4. *Roll* 25. a copy whereof we then likewiſe produced, which I have here tranſcribed for the rareneſs of this ſuit, and the obſcurity of the law herein.

It is, " *Inter recorda domini regis Car.* 2. *in theſauro recept.*
" *Scacc. ſui ſub cuſtodia dominor. commiſſ. ibidem remanent,* VIZ.
" *inter placita de tempore regis Henrici quarti inter alia ſic continetur*
Mich. 5 *H.* 4. *Rot.* 25. *Pluries Homine Repleg.* " *ut ſequitur,*" VIZ. " ROTULUS * *placitor. coram domino rege apud*
" *Weſtm. de termino Sancti Michaelis anno regis Hen.* 4°. *poſt con-*
" *queſtum* 5°. WILL. GASCOIGNE."

* [230] " *Adhuc de termino Sancti Michaelis.* W. GASCOIGNE *in*
" *dorſo.*"

" DEVON. *ſſ.* DOMINUS REX *mandavit breve ſuum clauſum in*
" *hæc verba Henricus dei gratia rex Angliæ et Franciæ et dominus*
" *Hiberniæ* VICECOM. DEVON. *ſalutem. Cum pluries tibi præcepi-*
" *mus quod juſte et ſine dilatione replegiari faceres* WILLIELMUM
" *filium* ADÆ SCUTT *quem* SIMON BRYT *et* JOHANNES *filius ejus*
" *ceperunt et captum tenent (ut dicitur) niſi captus ſit per ſpeciale*
" *mandatum noſtrum vel capitalis juſticiarii noſtri vel pro morte*
" *hominis vel pro foreſta noſtra vel pro aliquo alio recto quare ſecund.*
" *conſuetud. Angliæ non ſit replegiabilis; vel tu ipſe fuiſſes coram*
" *nobis a die ſanctæ Trinitatis in quindecim dies ultime preterit.*
" *ubicunque tunc fuiſſemus in Angliæ oſtenſurus quare mandata noſtra*
Return. " *præd. toties inde tibi direct. exequi tu contempſiſti, tuque ad diem*
" *illum nobis retornan. quod præd. breve adeo tarde tibi liberat. fuit*
" *quod nullam executionem inde fieri potuiſti propter temporis brevi-*
" *tatem et quod nulla alia brevia de replegiando præd.* WILLIELMUM
Alias pluries. " *tibi venerunt ante receptionem dict. brevis; ideo tibi præcipimus*
" *quod juſte et ſine dilatione replegiari facias præd.* WILLIELMUM
" *filium* ADÆ SCUTT *quem præfat.* SIMON BRITT *et* JOHANNES
" *filius ejus ceperunt et captum tenent, ut dicitur, niſi captus ſit per*
" *ſpeciale*

" *ſpeciale præceptum noſtrum vel capitalis juſticiarii noſtri, vel pro* " *morte hominis, vel pro foreſta noſtra, vel pro aliquo alio recto quare* " *ſecundum conſuetud. Angliæ non ſit replegiabilis, vel tu ipſe ſis coram* " *nobis a die Sancti Michaelis in quindecim dies ubicunque tunc* " *fuerimus in Anglia, oſtenſurus quare mandata noſtra præd. toties* " *tibi direct. exequi contempſiſti; et habeas ibi hoc breve: teſte* WIL- " LIELMO GASCOIGNE *apud Weſtmonaſterium. 30 die Junii anno* " *regni noſtri quarto.*" TURBET v. DASSIGNEY.

" *Ad quem quindena Sancti Michaelis coram domino rege apud* " *Weſtmonaſterium,* VICECOM. DEVON. *retorn. quod præd.* WIL- " LIELMUS *filius* ADÆ SCUTT *amotus eſt et elongat. extra ballivam* " *ſuam per præd.* SIMON BRITT *et* JOHANNEM *filium ejus in com.* " *Somerſet quare de ipſo* WILLIELMO *replegiand. juxta formam dict.* " *brevis adtunc nihil facere potuit.*" *Elongatus returned.*

" *Ac ex parte præd.* WILLIELMI *filii* ADÆ SCUTT *in curia* " *regis coram ipſo rege ſufficienter teſtatum eſt quod præd.* SIMON *et* " *filius ejus præd. latitant et diſcurrunt in comitatu* SOMERSET."

* " ET IDEO *præceptum eſt* VICECOM. SOMERSET *quod corpora* * [231] " *præd.* SIMONIS, *et filii ejus, in withernamio capiat, et eos ſalvo et* " *ſecure cuſtodiri faciat quouſque iidem* SIMON *et* JOHANNES *filius* " *ejus præfat.* WILLIELMUM *filium* ADÆ SCUTT *replegiari vo-* " *luerint et qualiter, &c. conſtare facias,* &c. *Capias in withernam* to another county.

" POSTEA, *ſcill.* 22° *die Januarii anno regni dom. regis nunc* " *quarto coram domino rege apud Weſtmonaſterium, veniunt* WIL- " LIELMUS PAWLETT, *et* SIMON BRITT, *jun. de Com.* SOMERSET, " *et* JOHANNES HALSE, *et* THOMAS PROWSE *de com.* DEVON. " *aſſerentes dict.* VICECOM. SOMERSET *corpus præfat.* SIMONIS " BRITT *occaſione præd. cepiſſe et ipſum in priſona domini regis ſub* " *cuſtodia ejuſdem* VICECOM. *fore detent. et manuceperunt habend.* " *corporis præd.* SIMONIS BRITT *coram domino rege ad præfat.* " *term. et quilibet eorum ſub pœna* 40 *l. quam quidam ſummam qui-* " *libet eorum manucapt. ſeparatim cogn. de terris et catallis ſuis ad* " *opus domini regis fieri ſi contingat ipſos corpus præfat.* SIMONIS " BRITT *coram domino rege ad præfat. terminum promptum non* " *habere ad faciend. quod curia domini regis conſideraverit in hac* " *parte, et petunt breve de ſuperſedeas præfat.* VICECOM. *direct. de* " *non detinendo ulterius corpus præd.* SIMONIS *in priſona domini* " *regis occaſione prædicta. Et eis conceditur, &c.*" Manucaptores. *Superſedeas.*

Now by this record it is plainly in the power of the court to bail a man taken in *withernam*, after an *elongatus* returned; and we will give any ſecurity for *Daſſigne*'s appearance. This is a caſe of great hardſhip, for either the ſheriff can make no other return but this, and a replevy, as the Court ſeemed to be of opinion in *Wilmore's caſe* (*a*) laſt term; and then certainly no action will lie againſt the ſheriff, though it be falſe, becauſe he can make no other return: and if an action will lie, and the party be not bailable till he has falſified the ſheriff's return by an action, ſuppoſe then the ſheriff Bail in *withernam*.

(*a*) Skin. 47.

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ſhould die, in what caſe will the defendant be? and what a hardſhip will it be on a man who perhaps never took him, if there can be no interpleading till the delivery of the body. But ſurely there may; for as it appears the writ is grantable on the prayer of any *procheine amy*, and the *teſtatum* may iſſue into another county upon the ſuggeſtion of ſuch, ſo the count and interpleading may be by
* [232] them; and ſo was it in the caſe of 12 *Edw.* 4. for * the *gager of deliverance* was after the count, &c.

Upon which, and MR. THOMPSON's argument, which was much to the purpoſe as to the laſt record and *gager of deliverance*, upon which two points he only inſiſted, THE JUDGES inclined he might be bailed, and that it was in the power of the Court ſo to do.

And the laſt day of Hilary Term after, he got off the fine; and on giving ſecurity to bring home the boy in ſix months, death and the peril of the ſeas excepted, he was diſcharged on bail.

In Trinity vacation the boy came home, and being brought into court was delivered to the father, but they never proceeded.

The ſheriff cannot return *non cepit* to a *homine replegiando*.

But in all this the judges ſtill ſeemed of opinion, that the ſheriff could not return a *non cepit*, for that would falſify the ſuggeſtion of the writ itſelf.

Ante, 219. Carth. 286. Comb. 200. 4 Mod. 183. 12 Mod. 36.

Caſe 223. Hughes *againſt* Cornelius.

Trinity Term, 32 *Car.* 2. *Roll* 1229.

The ſentence in a foreign court of admiralty, decreeing a ſhip to be *lawful prize*, is concluſive; and therefore though erroneous the owner cannot recover the ſhip back by *trover* againſt the vendee.

S. C. Raym. 473. S. C. Skin. 59.

TROVER brought for a ſhip and goods, and on a ſpecial verdict there is found a ſentence in THE ADMIRALTY COURT in *France*, which was with the defendant.

And now PER CURIAM agreed and adjudged, that as we are to take notice of a ſentence in the admiralty here (*a*), ſo ought we of thoſe abroad in other nations, and we muſt not ſet them at large again, for otherwiſe the merchants would be in a pleaſant condition; for ſuppoſe a decree here in THE EXCHEQUER, and the goods happen to be carried into another nation, ſhould the courts abroad unravel this? It is but agreeable with the law of nations that we ſhould take notice and approve of the laws of their countries in ſuch particulars. If you are aggrieved you muſt apply yourſelf to the king and council; it being a matter of government he will recommend it to his liege ambaſſador if he ſee cauſe; and if not remedied, he may grant letters of marque and repriſal.

And this caſe was ſo reſolved by ALL THE COURT upon ſolemn debate; this being of an *Engliſh ſhip* taken by *the French*, and as

(*a*) See Ladbroke v. Crickett, 2 Term Rep. 649.

a *Dutch*

a *Dutch ſhip* in time (*b*) of * war between *the Dutch* and *the French*.

Judgment for the defendants.

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* [233]

(*b*) The ſpecial verdict was, that one *William Gault*, a denizen of *England*, was owner of the ſhip at the time ſhe was taken; that the maſter of the ſhip was a native of *Holland*, but made a denizen of *England*; that two of the ſailors were *Dutchmen*, and the mate, with the eight other mariners, *Engliſhmen*; that the ſhip was *Dutch-built*, and taken during the war between *Holland* and *France*, and condemned as a Dutch prize in the court of admiralty in *France*, and ſold to the plaintiff *Hughes* under that ſentence; and that on her arrival in *England*, the defendant *Cornelius*, and others, as the ſervants of *William Gault*, took and converted the ſhip to their own uſe. S. C. Raym. 473. The ſentence of the admiralty was produced under ſeal. 2 Ld. Raym. 893. But THE COURT would not ſuffer this verdict to be argued, but ordered judgment to be entered for the plaintiff; for ſentence in a court of admiralty ought to bind generally, according to *jus gentium*. S. C. Skinner, 59. although the facts found by the ſpecial verdict were contrary to, and falſified the ſentence in, the admiralty court. S. C. cited by HOLT, C. J. who was counſel for the plaintiff. 2 Ld. Ray. 893. for the property is thereby altered, though the ſentence be unjuſt. S. C. cited Ewer v. Jones, 2 Ld. Ray. 936. Carth. 225. 9 Mod. 66. Bull. N. P. 244, 245. It has, however, been determined, that a ſentence of condemnation in a foreign court of admiralty is not concluſive evidence that a ſhip was not neutral, unleſs it appear that the condemnation went upon that ground, Bernarde v. Motteux, Dougl. 543; but ſuch a ſentence is *concluſive* as to every thing that appears on the face of it, Barazillay v. Lewis, Park. Juſ. 359. ſo, where no ſpecial ground is ſtated in the ſentence, but the ſhip is condemned generally as good and lawful prize, Salaucci v. Woodhouſe, Park. 362. unleſs manifeſtly, upon the face of it, againſt law and juſtice, Salaucci v Johnſton, Park. Inſ. 364. or contradictory to itſelf, Mayne v. Walter, Park. 363. And ſee the caſe of Burton v. Fitzgerrald, Stra. 1078.

The King *againſt* James.

Caſe 224.

A conviction on the ſtatute 17 Car. 2. c. 2. muſt ſtate that it was *on oath*. Ante, 182.

THE defendant was brought hither by *habeas corpus*: the return was two warrants of commitment, one of which is altogether void; the other was on 17 *Car.* 2. *c.* 2. for living and being in a corporation not having taken the oaths, &c.

Four exceptions were taken thereto.

FIRST, Becauſe it does not ſay "upon oath," but only "on "due proof." (*a*)

SECONDLY, The commitment was to *the new priſon*, and not to *the county gaol*; but it was held they might well enough. (*b*)

Juſtices may commit to the common gaol.

THIRDLY, There were two warrants, and two judgments conſequently, and ſo two executions for one and the ſame cauſe: to that THE COURT anſwered, We will diſcharge him as to the firſt warrant on the ſtatute 13 *Car.* 2. *c.* 1. and then it is general for not taking the oaths and making the declarations required in the

(*a*) The ſtatute only authorizes the two juſtices to commit "*upon oath* to them "of any offence againſt the act;" and it is ſaid to have been determined in the caſe of Rex v. R. Willis, Hilary Term, 19 Geo. 3. that when a ſtatute directs the information to be *on oath*, it ſhall be ſo ſtated in the conviction. Boſcawen on Convictions, page 16.

(*b*) See 2 Hawk. P. C. ch. 16. ſ. 5.

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ſtatute 17 *Car.* 2. *c.* 2. (whereas the renunciation of the covenant is not now required, the time for it being now expired). (*c*)

An offender againſt a penal ſtatute ought to be *ſummoned* before he is convicted.

FOURTHLY, MR. HOLT urged, that of common right a man ought to be *ſummoned*, and have liberty of anſwering before he be committed. (*d*)

PEMBERTON *Chief Juſtice.* True; of any offence at common law; but when a particular ſtatute preſcribes a particular mode of conviction, you cannot ſay it is neceſſary; as in caſe of deer-ſtealing (*e*): then he is not puniſhed for not taking the oaths and declarations, but for living within a corporation; the former is not the offence, but only the qualification.

Adjournatur. (*f*).

(*c*) *Quære*, Then what occaſion for the late ſtatute 5 Geo. 1. c. 6. by which this oath is aboliſhed.—Note to the former edition.

(*d*) That the party muſt be ſummoned, ſee Rex v. Venables, Stra. 630. Ld. Ray. 1405. Rex v. Kent, 2 Ld. Ray. 1546. Reg. v. Dyer, Salk. 181; and ſuch ſummons ought to be ſhewn in the conviction. Boſcaw. 54. *Sed qu.* if it need be particularly ſet forth, Reg. v. Green, 10 Mod. 213. Rex v. Simpſon, 1 Stra. 46. Rex v. Mallinſon, 2 Burr. 679; but the defendant's *appearance* cures any defect in the ſummons, or even the total want of one, Reg. v. Barret, Salk. 383. Rex v. Johnſton, Stra. 261. Rex v. Aikin, 3 Burr. 1785.

(*e*) But ſee Rex v. Barrett, Salk. 383.

(*f*) The commitment was on the ſtatute 17 Car. 2. c. 2. commonly called the *Oxford act*; by which it is enacted, "that all perſons who ſhall take upon "them to preach in any conventicle, contrary to the laws and ſtatutes of the "kingdom, ſhall not, unleſs only in paſſing on the road, come or be within *five* "*miles* of any city, town corporate, or "borough, or within five miles of any "pariſh, town, or place wherein he has "taken upon him to preach in any con"venticle, &c. before he has taken and "ſubſcribed *the oath*; and any two juſtices of the *reſpective county* may hear "and determine the offence, and commit "the offender." The defendant was committed in *Middleſex*. And it appears by S. C. reported by *Sir Thomas Jones*, that he was diſcharged becauſe it was not ſhewn that he came to any place in the county of *Middleſex* within five miles of *London*, or within the five miles after he had preached at a conventicle. S. C. Jones, 225. This act is further enforced by 22 Car. 2. c. 1. But ſee the toleration act, 1 Will. & Mary, c. 18.

Caſe 225.

Hitchin *againſt* Stevens.

Trinity Term, 34 *Car.* 2. *Roll*

In debt for rent by the bargainee of a reverſion, the omitting to ſtate *attornment* in the declaration is aided by *the verdict*. S. C. 2 Jones, 217.

BARGAINEE of a reverſion brings debt for rent, and alledges no attornment; *nil debet* pleaded; and a verdict for the plaintiff.

Moved in arreſt of judgment, becauſe the plaintiff has ſet forth no *title* to the rent, as he has none without attornment (*a*): there were * cited the caſes of *King v. Somerland*, *Latch.* 14. and *Pope v. Skinner* in *Hob.* 72. *Rolle* 489.

S. C. Raym. 487. S. C. 1 Danv. Abr. 610. 3 Keb. 354. 2 Salk. 662. Lilly Ent. 55. Cowp. 825. Dougl. 679. 1 Term Rep. 141. 145.

* [234]

(*a*) See 4 & 5 Ann. c. 16. and 11 Geo. 2. c. 19. by which the neceſſity of attornment is in this caſe taken away.

But

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But a rule was taken and agreed by ALL THE COURT, that in any caſe where any thing is omitted in a declaration, though it be matter of *ſubſtance*, if it be ſuch as without proving it at the trial the plaintiff could not have had a verdict, and there be a verdict for the plaintiff, that ſuch omiſſion ſhall not arreſt the judgment.

And upon this, after ſolemn debate in Hilary Term following, judgment was given for the plaintiff. (*b*)

(*b*) See the caſe of Spires v. Parker, 1 Term Rep. 141. in which MR. J. BULLER ſtates the rule upon this ſubject thus: "After verdict nothing is to be preſumed but what is expreſsly ſtated in the declaration, or what is neceſſarily implied from thoſe facts which are ſtated; as where a feoffment is pleaded without livery, a livery is always implied, becauſe it makes a neceſſary part of a feoffment. I know of no deciſion againſt this rule."—See alſo Ruſhton v. Aſpinal, Douglas, 679. Avery v. Hole, Cowp. 825.

Smith, qui tam, &c. *againſt* Langham. Caſe 226.

In reciting a ſtatute, a miſtake in the title of it as to the *adjournment* of the parliament is immaterial if the *prorogations* are rightly alledged.

S. C. Skin. 60. Ante, 166. Dougl. 97. notis.

DEBT on the ſtatute 22 *Car.* 2. *c.* 1. *ſ.* 11. of conventicles, for one hundred pounds againſt the defendant, being a juſtice, for nonfeazance of his duty by that act.

And after verdict divers exceptions were made in arreſt of judgment.

FIRST, That the title of the act was miſtaken as to the adjournments of the parliament (*a*), it being according to the printed book, which is plainly wrong, for it is ſaid adjourned ſuch a day from a day before.

But PER CURIAM, That is well enough, the *prorogations* being truly alledged, and all the reſt is trifling and immaterial.

SAUNDERS ſaid, The act againſt buying and ſelling of titles is miſtaken in the print; in ſome it being the 13th, and in others on the 15th of *January*, whereas on THE ROLL it is the 30th of *January*: and for this conventicle act, and the others as to the time of the ſettling them, it was left to the chancery clerks, who, ignorantly like themſelves, made them as now they are printed.

Though *two perſons* inform againſt a juſtice for nonfeazance under 22 Car. 2. c. 1. ſ. 11. yet *one* may have an action for the penalty.

ANOTHER EXCEPTION taken was, that the information was given to the defendant by two, and the action brought only by one. ANSWERED, That the action is given to any, and a ſtranger might have brought it.

Debt againſt a juſtice for the penalty in not granting a warrant on the 22 Car. 2. c. 1. need not aver the perſons informed againſt to be above *ſixteen* years of age, if it ſtate that the perſons at the conventicle were above that age.——S. C. Skin. 60.

ANOTHER EXCEPTION, It ſays that there was at the conventicle

(*a*) In the ſeveral editions of the ſtatutes by *Bertbelet*, *Raſtal*, *Pulton*, and *Keble*, the parliament is ſtated to have been adjourned on the 11th of April, 1670, but the ſubſequent editions of *Pickering*, *Ruffhead*, and *Runnington*, ſtate is to have been adjourned on the 22 April, 1670.

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twenty and more of the age of ſixteen years, beſides the family (*b*): then it comes and ſays, that for eight of them preſent, the informers prayed a conviction and warrants, but does not ſay theſe eight * were of ſixteen years of age.

* [235]

Adjournatur.

And afterwards judgment for the plaintiff. (*c*)

See A NOTE of ſome reſolutions in this caſe in the LORD SAUNDERS's Obſervations upon this Act, page

(*b*) But now by 1 Will & Mary, c. 18. it is enacted, that neither the 35 Eliz. c. 1. nor 22 Car. 2. c. 1. ſhall extend to any perſon preſent at, nor to any preacher in, any congregation, &c. who ſhall have regiſtered a certificate from the biſhop, and have taken the oaths, &c. as the act directs.

(*c*) Skinner reports, that on this exception the Court ſeemed to hold, that as it was alledged that *twenty or more* were of ſixteen years of age, it might be *intended* that *all* of them were of that age; and after conſideration upon this point, the Court at laſt gave judgment for the plaintiff, becauſe the defendant had refuſed to adminiſter *an oath* to the informer, which by the ſtatute he is required to do. S. C. Skin. 61.

Caſe 227. The Duke of Norfolk *againſt* Charles Howard.

In an action on a note payable three months after *the plaintiff* ſhould demand the ſame, a demand in writing left by the plaintiff's attorney at the houſe of the defendant is not ſufficient.

CASE upon a ſpecial promiſe on a note, wherein the defendant promiſed to pay to the plaintiff fifty pounds at any time during the joint lives of the plaintiff and defendant, within three months after the plaintiff ſhould demand the ſame; and "no "demand" *modo et forma* pleaded.

On the trial by *niſi prius* at *Guildhall*, before PEMBERTON *Chief Juſtice*, it appeared in evidence, that one *Manſon*, the plaintiff's attorney, delivered a demand in writing at the defendant's houſe to his maid, by whom he ſent it up to the defendant, he being ſick and not to be ſpoken with; the maid brought down word ſhe had delivered it to her maſter.

HELD no good evidence to maintain the action, for the demand ought to be perſonal; and delivery of a demand in writing to the ſervant at the houſe, is no good demand (*a*).

JEFFERYES of counſel with the defendant.

(*a*) See Jones v. Marſh, 4 Term Rep. 465.

Caſe 228. Cooke *againſt* Batthurſt.

Execution by *elegit* may be taken out on an old judgment without a *ſcire facias*.

UPON a judgment above a year's ſtanding, you may have an *elegit* without a *ſcire facias*, but not a *fieri facias*, for that on the *elegit* they enter their continuances all along from the judgment; and ſo was it ruled in this caſe upon MR. LIVESAY's report and MR. SAUNDERS's motion.

Hinton's

Hinton's Caſe. Caſe 229.

CASE on a bill of exchange againſt *the drawer*; the bill not being paid, and payable to J. S. or to the *bearer*, the plaintiff brings the action as bearer.

In an action againſt the drawer of a bill of exchange payable to *bearer*, the plaintiff muſt prove a conſideration paid for it.

And upon evidence ruled by PEMBERTON *Chief Juſtice*, that he* muſt intitle himſelf to it on a valuable conſideration, though among bankers they never make indorſements in ſuch caſe; for if he come to be bearer by caſualty or knavery, he ſhall not have the benefit of it. (*a*)

Ante 8. 180. Poſt. 437. 441.

509. 3 Lev. 299. 1 Salk. 125. 2 Freem. 257. 1 Burr. 452. 3 Burr. 1518.

* [236]

(*a*) In the caſe of Hodges v. Steward, Eaſter Term, 5 Will. & Mary, the holder of a bill of exchange payable *to bearer* was permitted to recover againſt *the drawer*, becauſe *a cuſtom* that ſuch a bill is aſſignable was alledged in the declaration, and confeſſed by the demurrer, Skin. 346; and the way and manner of trading in *particular places* may be taken notice of, Ford v. Hopkins, 1 Salk. 283. although there be no ſuch cuſtom, Clerk v. Martin, 1 Salk. 129. Powel v. Pearſon. But it was afterwards held, that the bearer of a note payable to a particular perſon, *or bearer*, could not, on the *general cuſtom*, maintain an action thereon in his own name againſt the maker, Nicholſon v. Sedgwick, 1 Ld. Ray. 180. Walmſley v. Child, 1 Vezey. 343. for it was only evidence of a debt, Meredith v. Chute, 2 Ld. Ray. 760. On this doubt, whether notes of hand, or inland bills of exchange, whether payable to order or to *bearer*, were within in the *cuſtom of merchants*, it was enacted by 9 & 10 Will. 3. c. 17. that inland bills ſhould be put upon the ſame foot with foreign bills, Bull. N. P. 272. and by 3 &. 4 Ann. c. 9. "that all "notes in writing, whereby the drawer "promiſed to pay any other perſon, or "order, or *unto bearer*, any ſum of money, "it ſhould be taken to be due to any "perſon to whom the ſame was made "payable, and be aſſignable and indorſe-"able over, and recoverable in the ſame "manner as inland bills of exchange are, "according to the cuſtom of merchants." This ſtatute however was held to make a note of hand, even when payable *to order*, only evidence of a valuable conſideration. Brown v. March, Gilbert's Eq. Rep. 154. 3 H. Bl. Rep. 602. and it was doubted whether a note, when made payable *to bearer*, was negotiable within the meaning of the ſtatute, Morris v. Lee, 8 Mod. 362. 1 Stra. 629. 2 Ld. Raym. 1396. but it is now ſettled in the caſe of Grant v. Vaughan, Trinity Term, 4 Geo. 3. that notes payable to *bearer* are by law negotiable, and that the *bearer* of them may maintain an action as bearer where he can entitle himſelf to them on a valuable conſideration. 3 Burr. 1523. 1 Bl. Rep. 485. See alſo Crawley v. Crawley, 2 Freem. 257. 1 Burr. 452. and therefore an innocent holder of a bill or note indorſed in blank, or payable *to bearer*, ſhall recover on it, though it was loſt or ſtolen, Miller v. Race, 1 Burr. 452. Peacock v. Rhodes, Dougl. 632. Price v. Neal, 3 Burr. 1354. 1 Salk. 126. except he ſuffer ſix years to elapſe, Walmſly v. Child, 1 Vezey 344. or it was originally given for money *won* at play, or upon a uſurious contract, Lowe v. Walker, Douglas 735. and the caſes there cited; but otherwiſe the want of conſideration cannot be averred by the drawer or maker of the note, except the action be brought by the *payee*, or the note be not within the cuſtom of merchants, Pearſon v. Ganell, 4 Mod. 242. Jeffries v. Auſtin, 1 Stra. 674. Bull. N. P. 274. See alſo the caſes of Vere v. Lewis, 3 Term Rep. 183. Collins v. Emmet, 1 H. Bl. Rep. 313. Minet v. Gibſon, 3 Term Rep. 485. Gibſon v. Johnſon, 1 H. Bl. Rep. 569. to 625. under what circumſtances an innocent indorſee of a bill of exchange, or holder of a note of hand made payable to a *fictitious payee* or *order*, may recover on ſuch bill or note, as on a bill or note payable to *bearer*. See Com. Rep. 43. 57. Skin. 411.

Caſe 230. The King *againſt* Sir Robert Atkyns, Sir John Knight, and others.

In an information againſt a recorder and other members of a corporation, for riotouſly aſſembling and chuſing an alderman, without the preſence of the mayor, contrary to *the charter*, it is not ſufficient to ſay, that "according "to the privi- "leges granted "by certain *let- "ters patent*, "the mode of "election "was uſed to be "in the preſence "of the mayor, "&c. as by the "ſaid letters pa- "tent will more "fully appear," but it muſt directly *aver* that THE CHARTER *was* granted to the corporation and ſhew the deed.

S. C. 3 Mod. 3. S. C. Trem. 230. 10 Co. 92. Moor 849. Dyer 29. Latch. 88. Salk. 497. 4 Term Rep. 6c8.

INDICTMENT for a riot at *Briſtol*, in aſſembling themſelves, and chuſing *Mr. Thomas Day* in the place of *Sir John Lloyd* for an alderman, without the preſence or privity of THE MAYOR, &c.

SIR ROBERT ATKYNS in perſon moved in arreſt of judgment. They only ſay that "*ſecundum privilegia conceſſa* by queen Eliza- "beth's letters patents they uſed, &c." and do not aver in fact a grant, or that there were ſuch letters patents, &c. nor do they ſo much as ſay that it is *antiqua villa*, or *civitas*; nor ſo much as that there is a mayor: or that the mayor is a member of the corporation: nor that it is a corporation: they barely ſay that we took upon us to chooſe another alderman in the place of one that was dead, without the privity or conſent of the mayor. (*a*) In the margin of *James Bagg's caſe* (*b*) as it is printed (which I take to be the LORD COKE's opinion) they ought to have preſcribed that they were a corporation, and to ſhew how: they do not directly ſay there were any letters patents granted, nor ſo much as a *continetur*, which is naught in pleading; it is only "*ſecundum privilegia* "*conceſſa pro, &c. prout per eas* ſhewn to the jury more at large appears." All criminal proceedings muſt be exact, and this is the king's count or declaration: the ſtatutes of jeofails extend not to them, but informations are expreſly excepted; and if informations are, then certainly indictments are alſo: it ſays the recorder and aldermen are *de privato concilio*, but it is with *the mayor*; whereas in *Bagg's caſe* it is with *the city* or *corporation*. The indictment ſays they have no cuſtom (for it is laid negatively) to meet about any public buſineſs without the ſummons of the mayor; it cannot be *a cuſtom*, * for that muſt be *time out of mind*; and there was no ſuch thing as election there before *Queen Elizabeth* time: By the charter THE MAYOR is not of the *quorum*, nor is his perſon neceſſary at the election, but as to the ſwearing of an alderman both MAYOR and RECORDER are of the *quorum*; and ſo it is in their charter as to the gaol-delivery: then for the MAYOR, he is no officer at the common law, as coroners and conſervators of the peace are; he is only a creature of the charter, and has his being purely thereby (*c*) his name is but *major*, not *maximus*, and the ſame as *prætor* amongſt the Romans, which is from *præcedere*: Then as for a corporation, it is only for the benefit of trade that it was firſt inſtituted, (*d*) and ſuppoſe a corporation made and no powers given them, they would be able only to make orders for

* [237]

(*a*) See Dyer 279. Latch. 229. 11 Co. 14.

(*b*) 11 Co. 93. S. C. 1 Roll. Rep. 373. 224. S. C. Hughes Ent. 273.

(*c*) 1 Roll. Abr. 514. pl. 20. See Rex v. Spencer, 3 Burr. 1827. Rex v. Tomlyn, Caſes T. H. 316. Barber v. Boulton, Stra. 314. Rex v. Smart, 4 Burr. 2241.

(*d*) 8 Co. 125.

the

the advancement and better government of trade; they cannot fine or impriſon; they cannot chooſe but by the power given them by the charter; and if their charter give them no power to chooſe new officers on the death of old ones, they cannot do it; though there be an opinion that they may in ſuch caſe; yet the *caſe of Dungannon* (*e*) in *Ireland* is direct, that when they are all dead the corporation is diſſolved; ſo that the ſole power ariſes from the charter, and that does not make the mayor's preſence neceſſary: in the mayor of *Oxford's caſe*, (*f*) they whoſe power is to conſtitute a court only can ſummon it: as in commiſſions of peace and of gaol-delivery, unleſs there be a clauſe nominating who ſhall, &c. ſo they who have power of election have the power of ſummoning the aſſembly or meeting for that purpoſe. As to the mayor's preſence I know no neceſſity thereof: I confeſs there is the *caſe of Hicks* (*g*) where two judges are of opinion, that the mayor's preſence is neceſſary, (*b*) but that was not an action or ſuit in the caſe, ſo that it is none of the beſt authorities, nor upon any argument, for that two judges only were preſent, which in caſe of argument is uſually ſuſpended till the court be full. And in that caſe the mayor was abſent at the time of the death of the alderman, and ſo he was not wilfully abſent. Nor * do I find that they were indicted for *a riot*, or ſo much as blamed, it being only a miſtake in judgment; but upon a complaint a writ was granted for a new election. By the ſtatute of *Weſtminſter the firſt*, elections ought to be free, and he cited likewiſe *Eden's caſe* in *Cro. Eliz.*

* [238]

PEMBERTON *Chief Juſtice.* This would have done better on a demurrer, than now after a verdict. *Adjournatur.*

It was afterwards moved again, and THE COURT agreed the indictment to be vicious for want of a recital of the letters patents; and the *prout per eoſdem* to be ill.

DOLBEN *Juſtice* cited a caſe of an indictment for a forcible entry, where it was ſaid *exiſtens liberum tenement. ſuum prout per indenturam quandam dat.* &c. *juratoribus præd. monſtrat. plenius liquet et apparet*; and that was held ill; and judgment ſtayed.

SIR ROBERT ATKYNS, on the LORD PEMBERTON'S and his brother's perſuaſion, reſigned his recorderſhip; which was all that the city of *Briſtol* aimed at by their indictment.

(*e*)
(*f*) Latch.
(*g*) The caſe of the mayor of Launceſton, 1 Roll. Abr. 514.
(*b*) See 4 Com. Dig. 8vo. edit. "Franchices." (F. 21.)

Middleton

Caſe 231. Middleton and others *againſt* Whitehead.

Aſſumpſit by aſſignees; the promiſe muſt be alledged to the bankrupt.
Cro. Car. 187.
Lutw. 274.
6 Mod. 131. 1 Salk. 111. 2 Com. Dig. 40.

INDEBITATUS ASSUMPSIT brought by the aſſignees of the commiſſioners of bankrupts of one *Legat*, for money received to the plaintiff's uſe: on the trial *it was held*, that the declaration ought to have been ſpecial; it having been received to the bankrupt's uſe.

Caſe 232. Peters, *qui tam*, *againſt* White.

On a ſuggeſtion of conformity, after verdict for the plaintiff, on 23 Eliz. c. 1. the court will allow the defendant time to enter the plea.
Ante 179.
Poſt. 331.

ACTION *of debt* upon the ſtatute of 23 *Eliz. c.* 1. for twenty pounds a month, for not coming to church, verdict for the plaintiff.

The defendant, upon a ſuggeſtion of *conformity*, prays leave and time to enter ſuch plea on THE ROLL, which after ſome debate was permitted by THE COURT, ſaying they might demur thereto; but they not putting it in, the plaintiff, for whom I was of counſel, entered his judgment.

An *audita querela* in chancery on a judgment in king's bench is bad.——1 Roll. Abr. 3111. Moor. 850. 1 Roll. Rep. 383. 2 Bulſt. 10. F. N. B. 104. Cro. Eliz. 33.

Thereupon they, in the vacation time, petition my LORD CHANCELLOR FINCH for an *audita querela*, and * there is *a fiat* for that only; however they get *a fiat* and *a ſuperſedeas*

* [239]

If *a ſuperſedeas* be granted to an *audita querela*, upon the proceſs of *venire facias*, before bail found, it is irregular.
F. N. B. 104.
Jones 378.
1 Salk. 192.
1 Com. Dig. "*Audita querela*" (E. 5.)

And I MOVED for the quaſhing of it, for that, if upon examination in this court, it appears that the *audita querela* lies not, this court may quaſh it without forcing the other ſide to demur; and ſo was it done in the caſe of *Tovey v. Aday*, 2 *Bulſt.* 140. (which caſe they cited on the other ſide, that bail might be taken as it was in that caſe) There debt was brought on a ſingle bill, and after judgment the defendant, being in execution, brings his *audita querela*, and upon a ſingle averment of payment made, he was bailed, and the plaintiff comes into court and moves for ſome remedy, for that ſuch plea againſt a ſingle bill is not good; *et per Curiam* the writ was quaſhed, and the bail taken off the file, and the party being in court, taken again in execution, and *an attachment* granted againſt the attorney who proſecuted it, for that no *audita querela* ought to be allowed but in open court; (*a*) the *venire facias* cannot be returnable in any other court than where the judgment is whereof the party complains, nor can nor ought *a ſuperſedeas* to go till the parties and plaintiff be allowed in this court and bail put in: here they have tacked a *ſuperſedeas* to their *venire facias*. In the caſe of *Baker v. Chew*, 2 *Bulſt.* 120. where on a ſuggeſtion in chancery

(*a*) 1 Bulſt. 140. 2 Bulſt. 97.

on

on an *audita querela*, they obtained *a ſuperſedeas*, as they did here, this proceeding is cenſured, and a great doubt is made, if the party being in execution, ſhould be thence diſcharged by ſuch *a ſuperſedeas*, whether it would not be an eſcape? ET PER CURIAM, This *ſuperſedeas* was certainly irregular.

But the queſtion now is, if we ſhall, upon taking bail, ſtay execution.

Qu. if the Court will take bail, and ſtay execution on an *audita querela*, if the *ſuperſedeas* on it is irregular.

As to that I URGED, that before allowance of the writ the court does alway examine whether it lies or no, and ſo are the books, as is the caſe alſo of *Cowley v. Lydiat*, 2 *Bulſt.* 97. The end of putting in bail is to anſwer the condemnation if they do not proſecute it with effect; and then it is when the matter alledged is doubtful, and an iſſue to be tried concerning ſome fact; but here we agree the fact ſo as they pretend, but we ſay that ought not to hinder the plaintiff of his execution; and in all the caſes that I can find, they * firſt argued, whether an *audita querela* did lie upon the ſuggeſtion they made for their *venire facias*, before its allowance by the Court. (*b*)

* [240]

Whereupon the Court ſaid, why ſhould it not lie in this caſe?

To that I URGED, that as for the king's part it could be never avoided by an *audita querela*, they muſt plead it, and as to the other they could have no advantage of it any way, it being after judgment; now as to the king's part he has no remedy but by petition, and ſo is it in the caſe of *Shoyle, qui tam, v. Dr. Foſter*, 2 *Bulſt.* 325. Then as to the informer's part it cannot lie, becauſe the conformity is laid to be before judgment, and he might have pleaded it before judgment; and it is a rule, that you ſhall never have an *audita querela* upon any cauſe whereof you might have taken advantage by plea (*c*) before judgment.

A defendant after judgment for recuſancy, on a *qui tam* action, cannot have an *audita querela*, on a ſuggeſtion of *conformity*, for they cannot plead that in diſcharge of the king's part of the penalty.

ET PER CURIAM. That is a true and a good rule, but your judgment is of *Michaelmas Term*, though ſigned the laſt day; and ſo as to purchaſors it binds, but from that day by the ſtatute 29 *Car.* 2. *c.* 3. of frauds and perjuries; yet as to this purpoſe it ſhall relate to the firſt day of term, and ſo their *conformity* is within the rule; ſeeing the 19th of *November* is ſubſequent to the judgment.

Jones 90. Moor 662. 5 Co. 86. 1 Bulſt. 140. 1 Term. Rep. 273. Tidd's. Pract. 216.

Then I URGED another rule, that there ought to be ſome deed under hand and ſeal, as defeaſance, releaſe, or the like, to ground the *audita querela* upon.

An *audita querela* may be founded on the biſhop's *certificate* of conformity.

DOLBEN *Juſtice* ſaid, That is true too, but here is a certificate under hand and ſeal of the biſhop, which anſwers that rule.

F. N. B. 102. Cro. Eliz 233.

Then as to the merits of the cauſe he comes too late, for now it is become *res judicata*, the penalty is attached, and there is *a*

A recuſant after judgment on a *qui tam* action

on 23 Eliz. c. 1. cannot have an *audita querela* to *prevent execution*, or a certificate of *conformity*, for he might have pleaded it in the action.——1 Roll. Abr. 306. Moor. 536. Ray 89. 1 Sid. 43. 1 Wilſ. 98. 1 Salk. 264. 1 Com. Dig. "*Audita querela*" (C.)

(*b*) 1 Bulſt. 140. Moor 354. (*c*) 2 Mod. 22. 222. 2 Salk. 653. 1 Wilſ. 98.

debt

PETERS v. WHITE.

debt due to the informer, which his executors may take advantage of if he ſhould die, by 23 *Eliz. c.* 1. *ſ.* 10.

BUT NOTE, he is not within that ſtatute, for it is before judgment; alſo there the words are "arraignment and trial," which refer to an indictment only, ours is an action of debt: and by 3 *Jac. c.* 4. *ſ.* 17. he cannot be helped, for ours is an action not an indictment; ours is brought on the 23 *Eliz. c.* 1. and not on that ſtatute, as the words of this proviſo require it ſhould be, for the words are, "ſo indicted, in ſuch manner and form as if this act
* [241] "had never been made;" now our action * would have held good if that act of parliament had never been made; and there it is "receive the ſacrament;" ſo that he can never take advantage of the clauſe in this act, unleſs he receive the ſacrament, which he has not done. Alſo by 1 *Jac. c.* 4. *ſ.* 2. which is the largeſt and moſt beneficial clauſe for *conformity*, and moſt inſiſted upon of the other ſide in theſe words, "that if any that is or ſhall be a re-"cuſant, ſhall ſubmit or conform him or herſelf, and become obe-"dient to the laws and ordinances of the church of *England*, and "repair to the church, and continue there during the time of divine "ſervice and ſermon, according to the true meaning of the ſtatutes "in that behalf in the ſaid late queen's time made and provided, "that then every ſuch perſon for and during ſuch time as he or ſhe "ſhall continue in ſuch conformity and obedience, ſhall from "thenceforth be freed and diſcharged of and from any the penalties "and loſſes which the ſame perſon might otherwiſe ſuſtain or bear, "in reſpect or by reaſon of ſuch perſon's recuſancy." This cannot help him for theſe reaſons:—FIRST, The words are plainly relative to former laws, and thoſe laws ſay before judgment.—SECONDLY, It ſeems deſigned to diſcharge a conforming recuſant from the incurring penalty, and no more.—THIRDLY, It muſt be during ſermon, which his certificate reaches not to; and it will be an abſolute diſcouragement to all ſuch ſuits, if, after the preſenter has been at ſo much charges as to bring it to a determination, and proved that he has forfeited a hundred pounds for an offence, and the court judges ſo to, and yet upon a ſtrained conſtruction he ſhould be ſtripped of all the fruit of his action.

MR. POLLEXFEN praying time to ſpeak thereto, THE COURT bid him move at pleaſure.

But in the mean while the defendant compounded the matter, and gave my client ſixty pounds, and there it ended.

Row

* Row *againſt* Ruſſel.

Caſe 233.

* [242]

A *barriſter* has the privilege to lay his *venue* in *Middleſex*, though he has retired from practice.

Ante, 176. 2 Salk. 668. 670, 671. 2 Vent. 47.

TRESPASS for a battery in *Eſſex*, laid in *Middleſex*. The *venue* was changed upon the common affidavit.

MR. SAUNDERS moves, that the plaintiff being a barriſter at law, the *venue* might lie in *Middleſex ſecundum privilegium*, his attendance being ſuppoſed requiſite on the courts here.

And granted accordingly, although it was alledged that he had diſcontinued his practice, and lived in the country for many years paſt, yet becauſe he had been a practitioner here, it was ordered to lie in *Middleſex*.

Overbury *againſt* Overbury.

Caſe 234.

The birth of a child is a virtual revocation of a will of perſonal property.

Plowd. 343. Salk. 592. 2 Atk. 268. 272. 1 Peer Wms. 304.

UPON an appeal before ſentence to the delegates, IT WAS ADJUDGED, that if a man make his will and diſpoſe of his perſonal eſtate amongſt his relations, and afterwards has children and dies, that this is a revocation of his will, according to the notion of the civilians, this being an *inofficioſum teſtamentum* (*a*).

(*a*) A will deviſing real eſtate may be virtually revoked by the ſame alteration in the circumſtances of the teſtator's family as will revoke a will diſpoſing of perſonal property, Brudenel v. Boughton, 2 Atk. 268. Brown v. Thompſon, Swinb. 535; and it ſeems to be ſettled that the alteration *preſumed* from a ſubſequent *marriage*, and the *birth of a child*, are the only circumſtances ſufficient for this purpoſe, Lugg v. Lugg, 2 Salk. 592. 1 Ld. Raym. 441. Eyre v. Eyre, 1 Peer Wms. 304. Brown v. Thompſon, Caſes in Eq. 413. Pullen v. Huſband, 1 Eq. Caſes, 413; for *marriage* alone is not ſufficient, Wilkinſon's caſe, 1 Vern. 23. Wellington v. Wellington, 4 Burr. 2165; nor even *marriage* and the *birth of children* who die in the lifetime of the teſtator, Driver v. Standing, 2 Wilſ. 88. but as the concurrence of theſe two circumſtances only raiſes a *preſumption* of the teſtator's intention to revoke his will, that preſumption, like all others, may be deſtroyed by evidence of the contrary, Brady v. Cubit, Dougl. 31. It has, however, been lately determined, that a *ſubſequent marriage*, and the birth of a *poſthumous* child, the wife of the teſtator being *groſſement enceint* at the time of his death, is an implied revocation of a will. Mich. Term, 34 Geo. 3. 5 Term Rep. 49 to 64. But marriage alone is a revocation of the will of a *feme ſole*, Hodeſen v. Lloyd, 2 Brown's C. C. 534. and ſee Ewbank v. Hattenwell, 2 Bro. Ca. Ch. 220. 514. Lawrance v. Wallis, 2 Bro. Caſ. Ch. 319.

—— *againſt* ——

Caſe 235.

In Chancery.

On a deviſe of money to be diſpoſed among the teſtator's children, at the *diſcretion* of the executors, the diſtribution ſhall be equal. Ca. Ch. 179. 1 Vent. 32. 233. 2 Atk. 619. 3 Bro. Caſ. Ch. 401. 416. 434. 2 Bro. Caſ. Ch. 38. 266.

IF a man deviſe a perſonal eſtate by his will, or thereby raiſe money out of his land to be diſpoſed among his younger children, according to the diſcretion of two or three perſons; de-

creed

creed by THE LORD CHANCELLOR, that the diſtribution ſhould be equal (*a*).

(*a*) See Peat v. Chapman, 1 Vezey, 542.

Caſe 236.

* [243]

* Palmes *againſt* Kebelthwayte.

Trinity Term, 34 *Car.* 2. *Roll* 3334.

CASE for diverting a watercourſe from the plaintiff's mill, with only a *debet et ſolet currere*, and does not ſay it was *antiquum molendinum.*

Argued that this was only a poſſeſſory action and need ſay no more: the caſe of Earl of *Rutland v. Bowler*, *Palm.* 290. is expreſsly the ſame declaration, and held good; and there was urged *Luttrel's caſe*, 4 *Co.* 1 *Leon.* 373. *Symonds v. Scaborne*, *Cro. Car.* 325. 575. *Sands v. Trefuſis*, *Cro. Jac.* 499.

Adjournatur.

Case for diverting a watercourſe, with a *debet et ſolet currere* only, is good; for being againſt a wrong doer, *poſſeſſion* without *preſcription*, is ſufficient.

S.C. Poſt, 249. S. C. 1 Show. 64. S. C. 3 Mod. 48. S. C. 3 Lev. 133. S.C. Carth. 84. S. C. Comb. 9. S.C. Skin. 65. 175. S.C. Holt 5. 6 Mod. 312. 2 Vent. 292. 3 Lev. 133. 10 Co. 59. Cro. Jac. 43. 123. Owen, 109. Skin. 213. 621. 516. Cro. Car. 500. 575. 4 Term Rep. 718.

Caſe 237.

Hardie *againſt* Pawling.

Michaelmas Term, 32 *Car.* 2. *Roll* 90. *B. R.*

ERROR on a judgment in the court of Common Pleas, in *replevin* for cattle taken at *Southpetherwin:* avowry that the place WHERE is three acres, parcel of a meſſuage, or tenement, with the appurtenances in *Tregovile* in the pariſh of *Southpetherwin*; and that *Thomas Tregedwick* was thereof ſeiſed in the twenty-fourth year of *Queen Elizabeth*, and conveyed the ſame to *Mohun* and *Courtney*, and their heirs, to the uſe of himſelf for life, and afterwards to *Nicholas Tregedwick* his ſon, and the heirs of his body, and afterwards to *Joan Cooke* in tail; and after that to *Roger Tregedwick* in tail, and to *John Tregedwick* in tail; and afterwards to *William Lower* and *John Treſey* in fee: that *Thomas* died ſeiſed, that *Nicholas* entered, and the laſt day of *November*, in the thirty-firſt year of Queen *Elizabeth*, demiſed the meſſuage to *William Jordan* and *Grace Jordan*, during the lives of them two, and the longer liver of them; that *Nicholas* on the tenth of *January*, in the firſt year of *James the Firſt*, died without iſſue, the reverſion deſcending to *Joan Cooke*, who, on the eighteenth day of *March*, in the ſixteenth year of *James the Firſt*, for ſervice done her by *Jane*

If tenant in tail *diſcontinue* the eſtate by making a grant for life, not warranted by the ſtatute 32 Hen. 8. c. 28. and die without iſſue, a ſurrender made by the tenant for life to the remainder man in tail will not purge the *diſcontinuance*, and therefore he cannot bar his iſſue in tail by ſuffering a common recovery with ſingle vouchee; for not being *remitted* to his eſtate in tail by acceptance of the ſurrender, he is not in poſſeſſion: but a leaſe for years made by ſuch remainder man in tail, to commence after the grant for life, ſhall be good againſt him by eſtoppel. S. C. 1 Vent. 358. S. C. Skin. 2. 62. 2 And. 39. 2 Roll Abr. 420. Co. Lit. 359. 1 Leon. 37. 93. Co. Lit. 349. 6 Com. Dig. "Remitter," (c. 5.)

Mallet,

Mallet, and for money paid, did grant to *Trefuſy* and *Samſon*, the meſſuage for ninety-nine years, if *Jane Millet* ſhould ſo long live, to begin at the end of the former leaſe to *Jordan*, rendering eight ſhillings annually, and * two capons at *Michaelmas* every year, of the value of two ſhillings, and one day's work in ſeed-time, and one day's work in harveſt: and afterwards *William* and *Grace Jordan* ſurrender to *Joan Cooke*, and *Chriſtopher* her ſon, their eſtate, upon condition for payment of one hundred pounds 1ſt *April*, 17 *Jac.* by which *Joan Cook* was ſeiſed; that ſhe and her ſon *Chriſtopher*, *Mich.* 17 *Jac.* ſuffered a common recovery with a ſingle voucher, which recovery was to the uſe of *Joan Cook* and her heirs; and that afterwards *Joan Cook* and her ſon *Chriſtopher*, and *Nicholas* the ſon of *Chriſtopher*, and *Anthony Cook*, and *Leonard Treſey*, for 3 *l.* 6 *s.* 4 *d.* granted the meſſuage, &c. by deed to *William Hardie* and his heirs; that *William* and *Grace Jordan* did attorn; that *William Hardy* dies, leaving *John Hardy* his ſon and heir; *John Hardy* demiſes to *John Hicks* and his heirs; that *Grace* and *William Jordan* died; that *Trefuſis* and *Sampſon* entered; then *John Hicks* dies, and the land deſcends to *John* his ſon; who by his will in writing deviſes it to the aforeſaid *John Hardy*, and his heirs, and dies; and juſtifies the taking for five years rent, *viz.* forty-four ſhillings *per annum*.

* [244]

Vide ante. Harris v. Belchey, 91.

Hereto there is a demurrer; and judgment *quod nil capiat per breve*; and writ of enquiry according to the *Oxford Act*, 17 *Car.* 2. *c.* 7. and no judgment *de retorno habendo*.

POLLEXFEN *for the plaintiff* took two exceptions to the pleading, as to its form.

FIRST, That, in the avowry, the ſurrender is ſaid to be to *Joan* and her ſon *Chriſtopher*, whereas the reverſion was in *Joan* alone.

SECONDLY, It is ſaid that *Joan* and others did infeoff and grant to *Hardy*, whereas of their own ſhewing *Joan* only had the title.

As to THE SUBSTANCE the caſe ſtands thus: Tenant in tail makes a *diſcontinuance* for life; the reverſion in fee deſcends to the tenant in tail in remainder; then he makes a leaſe rendering rent, and the tenant for life ſurrenders upon condition to him; then a recovery is had with a ſingle voucher to the uſe of, &c.; then the tenant for life dies, and an avowry is for the rent: now if the tortious reverſion be gone, then the rent is likewiſe gone (*a*). The diſcontinuance being but upon a condition, and that defeated; * the entry of the rightful party is lawful (*b*). The eſtate for life was gone, and *Joan* remitted, and ſo ſhe was tenant in tail: he agreed that where the diſcontinuance was in fee, the taking back of the eſtate will not do it: the recovery was naught, becauſe *Joan*

* [245]

(*a*) Lit. ſect. 632. Co. Lit. 336. (*b*) 3 Co. 43.

only

HARDIE v. PAWLING.

only was tenant: by *Jordan*'s ſurrender the diſcontinuance is gone, by the *remitter* the rent on the leaſe for years is gone (*c*). By the ſurrender, the eſtate for life is extinct, and therefore *Joan Cook* muſt be remitted, and the condition annexed to the ſurrender cannot hinder the *remitter*; for the *diſcontinuance* being once purged can never be revived: if *Joan* be remitted the rent is gone, becauſe the wrongful reverſion on which it depended is gone; for there ought to be a privity of eſtate to preſerve the rent; which fails here (*d*). And if there be no *remitter*, then *Joan* being not in as tenant in tail, but of a tortious eſtate by *diſcontinuance*, and coming in as tenant to the *præcipe*, and not as vouchee, the recovery is naught (*e*). He agreed, that if ſhe had been tenant in tail, her ſon's joining as tenant to the *præcipe* would not vitiate the recovery, according to the caſe *Eure v. Snowe* (*f*). Then as to the pleading it is double (*g*).

MR. SAUNDERS *for the defendant* agreed it *a remitter*, but argued that the rent continued notwithſtanding; for that the rent was good againſt *Joan*, and by the common recovery it is confirmed, and the feoffee ſhall never avoid it (*h*).

Adjournatur.

It was afterwards argued again, and a difference being taken was inſiſted on between a rent iſſuing out by way of reſervation and the grant of a rent.

THE LORD CHIEF JUSTICE declared, that there can be no *remitter* againſt a party's non-acceptance, where the perſon is of full age and his entry not lawful; and *Joan Cook* being not remitted, the recovery could not bind the iſſue in tail, for ſhe was then ſeiſed of another eſtate, *viz.* a tortious fee, ſhe being a tenant to the *præcipe*; otherwiſe if ſhe had been a *vouchee*. *—*Quære* this caſe; and ſee the books.

* [246]

Adjournatur. (*i*).

(*c*) Co. Lit. 333.
(*d*) Co. Lit. 318. Moor 98.
(*e*) Cuppledike's caſe, 3 Co. 5.
(*f*) Plowd. 514. 18 Viner's Abr. 214. Creuſe on Recoveries, 204. 210.
(*g*) Partridge v. Strange, Dyer, 74. pl. 29. Rex v. Corporation of the Trinity Houſe, Trinity Term, 14 Car. 2. 1 Sid. 54. 86. 1 Keb. 137. 250. 270. 300.
(*h*) See the caſe of Ewer v. Snow, ubi ſup.
(*i*) This caſe was argued again in the Hilary Term following; and SKINNER reports, that THE COURT held plainly that *Joan Cook* was not *remitted* by accepting the ſurrender, nor the eſtate tail *barred* by her ſuffering the recovery. S. C. Skin. 62. And this is confirmed by VENTRIS, who reports, that "as to the recovery it "was held clearly good, although a "ſtranger, who had nothing in the land, "was made tenant to the *præcipe* with "the tenant in tail; for the recompence "in value ſhall go to him who loſt the "eſtate, and being a common aſſurance it "is to be favourably expounded." S. C. 1 Vent. 358.—MR. HOLT, who argued for the plaintiff, ſaid he would not inſiſt upon the *matter of law*; and the exception to the pleading was afterwards overruled, and judgment given for the avowant. S. C. Skin. 63. See Lincoln College caſe, 3 Co. 58. Griffin v. Stanhope, Cro. Jac. 454.

The

The Duke of York *againſt* Pilkington. Caſe 238.

SCANDAL. MAGNAT. for that there being a diſcourſe concerning the plaintiff, the king's only brother and heir, and one of the chiefeſt peers of the realm, the defendant ſaid of him, "He "has burned the city, and is now come to cut our throats:" Upon a direct and full proof by *Sir William Hooker*, and *Sir Henry Tulſe*, aldermen of *London*, he was found, by a jury of *Hertfordſhire* gentlemen, to be guilty; and damages £. 100,000. And the laſt day of term he rendered himſelf in diſcharge of his bail.

To accuſe a peer of diſaffection to the government is actionable.

Poſt, 435. 505. S. C. Skin. 70.

Dixon *againſt* Thompſon. Caſe 239.

ACTION of the caſe for the *malicious proſecution* of a ſuit in an inferior court without cauſe: The defendant pleads that the plaintiff was indebted to him by bond in the ſum of ſix hundred pounds, *et pro recuperation, ejuſdem*, &c.

To an action for a malicious proſecution; A PLEA that the action was brought to recover a debt on bond, without alledging that the money was *due* and unſatisfied, is bad.

Demurrer to it, becauſe he does not ſay expreſsly that the money was due and recoverable, for it might be (and the fact really was) that the day of payment in the condition of the bond was not come.

Adjournatur.

Ante, 144. 154.

1 Saund. 228, 229. 1 Salk. 14, 15, 21. 2 Salk. 456. 2 Jo. 132. 6 Mod. 261.

PEMBERTON *Chief Juſtice.* That whereſoever the plea amounts to the *general iſſue*, there you may *demur* is a fallible rule; for where ever there is a matter of law in it, which may inveigle the jury, they may plead it *ſpecially*, as "entry and ſuſpenſion."

Special pleading.

5 Mod. 177.

Oſborne *againſt* Jerome. Caſe 240.

ERROR on a judgment in *aſſumpſit* in an inferior court. The declaration ſtated that he was indebted at *Derby* within the juriſdiction of the court, for divers wares ſold and delivered, and being ſo indebted, did, at *Derby* aforeſaid, within the juriſdiction of the court, aſſume and promiſe; and aſſigned for error, that the goods were not alledged to be ſold and delivered within the juriſdiction of the court.

A declaration in *aſſumpſit* in an inferior court for goods ſold and delivered, muſt aver that they were ſold and delivered within the juriſdiction of the court.

Ante, 33.

And allowed; and judgment was reverſed (*a*).

(*a*) See Stannian v. Davis, 6 Mod. 223. Salk. 404. 2 Ld. Ray. 795. Peacock v. Bell, 1 Saund. 73. Waldock v. Cowper, 2 Wilſ. 16. Winford v. Powell, 2 Ld. Raym. 1310. Trevor v. Wall, 1 Term Rep. 151. in point.

Caſe 241. Powel, qui tam, *againſt* Weekes.

Debt lies for the penalty on 17 Car. 2. c. 3. though the party has ſuffered the ſix months impriſonment.

DEBT for forty pounds on the five mile act, 17 *Car.* 2. *c.* 2. *ſ.* 3. againſt the parſon for coming within a corporation, &c.

IT WAS ADJUDGED upon debate, that the action lies for the penalty, though the party has ſuffered ſix months impriſonment according to the tenor of the act.

S. C. 2 Jones, 226. S. C. Skin. 83.

Quod cum good in debt on a penal ſtatute.

THEN it is ſaid, "*quod cum* he having been a preacher, &c." which is a matter traverſable, and therefore not ſufficiently averred. *Sed non allocatur.*

A declaration on 17 Car. 2. c. 2. againſt a diſſenting miniſter, for preaching within five miles of a corporation, muſt ſtate *the place* where he preached.

Then another exception taken did hold good, *viz.* no place was laid where he came, but generally *ad civitat' de Briſtol*; whereas the penalty is part thereof given to the pariſh, where, &c. and therefore it is neceſſary to alledge a pariſh where; and upon this there was judgment for the defendant.

A *venue* never laid in *a pariſh*, except in *London*.

NOTE, That generally we never lay *the venue* in a pariſh unleſs in *London*; for a pariſh may extend into divers vills, &c.

5 Co. 120. 9 Co. 67. 1 Sid. 178. Cro. Jac. 150. 307. 2 Hawk. P. C. ch. 23. ſ. 92.

Caſe 242. Anonymous.

The commiſſioners cannot break open any other houſe than the bankrupt's.

RESOLVED by PEMBERTON *Chief Juſtice*, at *Guildhall*, that commiſſioners of bankrupt cannot break open a houſe to ſearch for the bankrupt's goods, unleſs it be the bankrupt's goods in the houſe of the bankrupt.

Molloy, 235. Cook's B. L. 148. 1 Atk. 136.

Caſe 243. Checkley *againſt* Checkley.

A bond given to a *feme covert* is not diſcharged by her huſband making the obligor his executor.

DEBT on a bond made to *a feme* during coverture, and by her huſband's conſent.

The defendant pleads, that the huſband made him his executor.

HELD no good plea; and ſaid, that perhaps the reaſon why he made him his executor was his giving that bond

Poſt. 401. Co. Lit. 264. 8 Co. 136. 1 Roll Abr. 934. Cro. Eliz. 114. 1 Salk. 306. 325. 12 Mod. 290. 1 Com. Dig. "Adminiſtrator," (B 5.) 3 Term Rep. 557.

Scambler

* Scambler *againſt* Johnſon.

Caſe 244.
* [248]

TRESPASS. Preſcription for common of paſture for all beaſts *levant et couchant* upon *a meſſuage*, in which he alledges himſelf to have an eſtate for another's life.

A preſcription for common of paſture for all beaſts *levant et couchant*, as appendant to *a houſe*, is good.

Exception was taken becauſe of the word "meſſuage."

BUT HELD good enough, and ſaid to have been ſo adjudged frequently; for a meſſuage hath included in it yards and curtilage, and the like.

S. C. 2 Jones, 227. 1 Roll Abr. 398. Ante, 96.

4 Co. 37. 1 Salk. 169. 1 Ld. Ray. 726. 1015.; and ſee the caſe of Scholes v. Hargreaves, 5 Term Rep. 46.

ANOTHER EXCEPTION was taken, becauſe it does not aver the life of *ceſtui que vie* to be in being, but ſays only *adhuc ſeiſitus*.

In pleading title under a leaſe *pur autre vie*, *adhuc ſeiſitus* is a ſufficient averment.

BUT HELD that *adhuc ſeiſitus* is a ſufficient averment of the life.

Co. Lit. 17. *a*. 42. *a*. Plowd. 191. 5 Mod. 72.

Copping *againſt* Slaymaker.

Caſe 245.

COVENANT. Demurrer to the declaration. The memorandum is "*de placito conventionis fractæ*;" but the declaration is "*quod per talem indenturam aſſumpſit et agreavit*," and ſets forth, in the declaration, the indenture, and concludes like to a declaration in caſe, without any "*et ſic infregit conventionem ſuam "prædict.*"

A declaration beginning in *covenant* and ending in *caſe* is informal.

S. C. Poſt, 303. S. C. 2 Jones, 229. S. C. Skin. 120.

PER CURIAM, It ſeems to be ill, becauſe altogether informal.

But the exception on which they adjudged the declaration naught, was this: The covenant was, that he ſhould not alien without licence; and the breach was, that he made a leaſe "*contra formam "et effect. conventionis præd.*" and does not ſay *abſque licentia*: HELD naught.

On a covenant not to aſſign without licence, a breach aſſigned in making a leaſe, not ſaying "without licence," is

Judgment for the defendant.

bad.——Hard. 320. Cro. Jac. 486.

Caldicot *againſt* Comit. de Pembroke.

Caſe 246.

EJECTMENT. This cauſe was appointed for trial at the bar of this court by a jury of *Wilts*, and a *venire* returned, and the jury ſummoned; but before the day the parties agree; and the ſummons not being countermanded, ſeveral of the jury appeared.

After *venire* returned and jury ſummoned, if the parties agree and do not countermand the ſummons, the jurymen who appear ſhall have their uſual charges.

I MOVED that they might have their charges.

CALDICOT v. PEMBROKE.

And IT WAS ORDERED that the attornies on both * ſides ſhould pay them between them, as was uſual in other like caſes, as THE COURT ſaid.

* [249]

Caſe 247. Bouchier *againſt* Friend.

On judgment againſt *caſual ejector*, a *latitat* ſhould be ſued out and bail filed. Ante, 201.

IN caſe of judgment againſt the caſual ejector, there ought to be a *latitat* ſued out againſt, and common bail filed for the caſual ejector; as was agreed by THE COURT in this caſe; and the judgment ſet aſide for want of it, on my motion. (*a*)

(*a*) By a rule of court made in Mich. Term, 33 Car. 2. no perſon could take judgment againſt the caſual ejector without A CERTIFICATE that a *latitat* had been taken out and *bail* filed; but now it is permitted, on motion, without a certificate, Impey Pract. edit. 1791. p. 548. nor is there any neceſſity now actually to ſue out a *latitat*, Run. Eject. 86; but *bail* muſt be filed for the caſual ejector or the tenant in poſſeſſion is not obliged to accept of a declaration, Crompt. Pract. 170. 1 Bl. Rep. 197. 2 Bac. Abr. 163, 164.

Caſe 248. Reeve *againſt* Winnington.

Michaelmas Term, 32 Car. 2. Roll 473.

A deviſe of "all "my eſtate to "my wife" paſſes an eſtate in fee.
S. C. 3 Mod. 45.
S. C. 2 Eq. Abr. 299.
Cro. Car. 450.
Stiles, 281. 294.
2 Lev. 91.
1 Mod. 101.
6 Mod. 106.
Comy. Rep. 167.
2 Atk. 38.
1 Salk. 227.
Cowp. 306.
Dougl. 763.
1 Term Rep. 414.
2 Term Rep. 659.
4 Term Rep. 93.

BY direction out of chancery a ſpecial verdict found J. S. to be a freeman and citizen of *London*, and to be ſeiſed of an eſtate in fee ſimple in the houſes in queſtion; and that *ea intentione* to make his will and teſtament, he ſaid theſe words, "I hear *John* "*Reeve* (who was plaintiff and heir to the teſtator) is inquiring "after my death; but I am reſolved he ſhall have nothing but "what his father left him, and I give *all my eſtate* to my wife;" and that this was proved and inrolled in THE HUSTINGS, *prout* alledged in the pleading; and they find the cuſtom as alledged, which was of deviſes in the city of *London*; and that J. S. had a perſonal eſtate to the value of five hundred pounds and a leaſe for years in an houſe in *the Strand* in *Middleſex*.

THE LORD CHIEF JUSTICE at the trial ſaid that doubtleſs by the cuſtom an inheritance may be paſſed by a deviſe, and that theſe words in a will will carry *a fee*, and not barely for life. But the queſtion will be, if the cuſtom will reach to paſs it under the word "eſtate," without a particular name.

And judgment was afterwards given for the defendant. (*a*)

(*a*) The ſpecial verdict was argued in the King's Bench, in Trinity Term, 36 Car. 2. The only queſtion made was whether by the words of the will the wife of the teſtator took an eſtate for life or in fee, and the Court were of opinion, that by the words "all my eſtate," the wife took all the real eſtate in fee, S. C. 3 Mod. 45. becauſe by the other words it appears that he meant to exclude the heir at law, S. C. 2 Eq. Abr. 299. S. C. cited 12 Mod. 594. See alſo Tanner v. Wife, 3 Peer Wms. 295. Hegan v. Jackſon, Cowp. 306. Loveacres v. Blight, Cowp. 352. Den v. Gaſkin, Cowp. 657. 660. Doe v. Davies, Dougl. 716. Maundy v. Maundy, Dougl. 763. Holdfaſt v. Martin, 1 Term Rep. 411. Fetcher v. Smiton, 2 Term Rep. 656. Palmer v. Richards, 3 Term Rep. 356. 360. Beezley v. Woodhouſe, 4 Term Rep. 89. Daily v. King, 1 H. Bl. Rep. 3.

Palmis

Palmis *againſt* Heblethwait. Caſe 249.

CASE for diverting a watercourſe laid three ways: upon one was found a ſpecial verdict; and as to that the caſe was, a man has an ancient watercourſe through his lands to an old mill, and he pulls * that down and builds a new mill; a ſtranger abates a dam, which guides the ſtream, the dam ſtanding on this ſtranger's ground, and guiding the water to the defendant's and plaintiff's ground both: and as to this third offence whereon this verdict was found, BY ALL THE COURT it was held for the plaintiff.

Preſcription to have a water courſe to an *antient mill* is not deſtroyed by pulling down the *old* and building a *new* mill on the ſame ſtream.

S. C. Ante, 243. S. C. 1 Show. 64.

But as to the other *Adjornatur.*

S. C. 3 Mod. 48.——S. C. 3 Lev. 133. S. C. Carth. 84. S. C. Comb. 9. S. C. Skin. 65. 175. S. C. Holt, 5. 4 Co. 88. Hob. 39. 4 Mod. 45.

* [250]

Beningſage *againſt* Ralphſon. Caſe 250.

CASE. Declaration on *aſſumpſit* to deliver merchantable commodities, and that he delivered dirty aſhes inſtead of them; and declares likewiſe on *a warranty:* demurrer to the declaration.

Aſſumpſit and *deceit* cannot be joined in the ſame declaration.

S. C. 1 Vent. 365. S. C. Skin. 66. Theſ. Dig. b. 10. c. 15. Carth. 189. 2 Lev. 101. 3 Lev. 69. Ray. 233. 5 Mod. 91. 1 Salk. 10. 3 Wilſ. 348. 2 Wilſ. 319. 1 Term Rep. 276.

THOMPSON *for the plaintiff* cited *Brownl.* 8. and the caſe of *Gelding v. Goteer*; (*a*) caſe for miſuſing his horſe, and for money for the hire of him too; and the caſe of *Matthews v. Hopping*; (*b*) caſe againſt a carrier on the cuſtom and *trover* joined. (*c*)

But SAUNDERS oppoſed it, ſaying, theſe are of ſeveral natures, one is in *the tort*, the other in *the right*, they require ſeveral iſſues. (*d*)

And judgment was for the defendant.

And we afterwards were forced to declare in *deceit* only, and recovered a hundred pounds damages. I being of counſel in this cauſe for the defendant. (*e*)

(*a*) Hilary Term, 16 & 17 Car. 2. in B. R. 1 Keb. 847.

(*b*) Hilary Term, 16 & 17 Car. 2. in B. R. 1 Keb. 852. 1 Sid. 244. See alſo 1 Vent. 223. 365.

(*c*) See Dicken v. Clifton, that an action againſt a common carrier for ſpoiling goods, and trover, may be joined, 2 Wilſ. 319. S. P. Owen v. Lewyn, 1 Vent. 223. S. P. Matthews v. Hoſkin, 1 Sid. 244. See alſo Mart v. Goodſon, 3 Wilſ. 348. Bean v. Bloom, 3 Wilſ. 456.

(*d*) See Bedford v. Allcock, 1 Wilſ. 248. Gilbert's Com. Pleas, 7.

(*e*) In S. C. Skinner, it is ſaid the Court took time to be adviſed, for the *warranty* in this caſe is in nature of a contract as well as the *aſſumpſit*, and ſuch an action as, if the defendant had died, would have charged his executors; for although it could not have been proved that the defendant *knew* the commodity was bad, yet the plaintiff would have had a verdict, S. C. Skin. 66. and *Ventris* ſays the caſe was adjourned becauſe the counts ſeemed to be both on the contract S. C. 1 Vent. 366. And by the caſe of Brown v. Dickſon, it is ſettled that wherever the *ſame plea* may be pleaded and the *ſame judgment* given on ſeveral counts, *they may be joined* in the ſame declaration, 1 Term Rep. 274. It may be neceſſary to add, however, that *Skinner*, in his report of the principal caſe, agrees that the plaintiff afterwards ſtruck out that part of the declaration which was grounded on the warranty, S. C. Skin. 67.

Caſe 251.

Row *againſt* Clargis.

It is actionable to call a juſtice of the peace and a deputy lieutenant *a papiſt.*

S. C. Raym. 482.
S. C. 3 Lev. 30.
S. C. 3 Mod. 26.
S. C. Skin. 66. 88.
S. C. 1 Freem. 280.
Ante, 140.
2 Vent. 265.
3 Mod. 103.
Cro. Jac. 484.
Cro. Eliz. 268.
Show. C. P. 12.
4 Leon. 121.
2 Salk. 694.
7 Mod. 107.
2 Ld. Ray. 812.
3 Viner Abr. 497.

ERROR on a judgment in the Common Pleas in an action on the caſe for theſe words, "He is a papiſt," ſpoken *of* him being a juſtice of the peace, and a deputy lieutenant.

MR. HOLT *for the plaintiff* in the writ of error argued, that the words are not actionable in themſelves if not ſpoken of an officer; and reproachful words, if they do not draw a ſcandalous puniſhment, are not actionable. (*a*) "*Witch*" is not actionable, nor "*ſorcerer*," nor "*inchanter*," if no act be alledged (*b*) to bring him within the ſtatute of 1 *Jac.* 1. *c.* 12. (*c*) A papiſt if he come not to church is puniſhable for that, but not for being a papiſt. And theſe two offices that are * ſet forth will not make it actionable, becauſe the words touch not thoſe two offices or places, though perhaps his ſaying ſo may occaſion his being put out of them; yet that will not make them actionable. (*d*) They are not places of profit, but honorary. *Bill's caſe* of "buffleheaded juſtice" not actionable, (*e*) becauſe the place is not profitable. 2 *Roll Rep.* 43. compared with his Abridgment, 56. As to the caſe of *Walgrave v. Agas*, *Cro. Eliz.* 191. he anſwered, that judgment was given there becauſe it touched his allegiance; then that was a profitable office; and the times (as is objected) ſurely cannot make an alteration of the laws.

* [251]

MR. BONYTHON argued *è contra.*—FIRST, It is actionable in itſelf, becauſe it expoſes him to all the penalties of the ſtatutes.—SECONDLY, It is certainly ſo by reaſon of the offices and places. Papiſts are made incapable of offices, and it is all one with "papiſt convicted." Several ſtatutes make them to be diſarmed: and he cited the caſe of *Harper v. Beamand*, (*f*) *Boughton v. Biſhop of Coventry*, (*g*) *Kempe v. Houſgoe*, (*h*) *Beamond v. Haſtings*, (*i*) *Bleverhaſſet v. Baſpole*; (*k*) *Chicheley v. Barker*; (*l*) *Laſſells v. Laſſells*; (*m*) *Carlian v. Mill*; (*n*) *Wyndham v. Clen*; (*o*) and 1 *Roll Abr.* 75. and ſaid, that moſt of the caſes cited on the other ſide were before the ſtatute of king *James.*

WINNINGTON in Hilary Term following argued for the plaintiff in the error. In 27 *Hen.* 8. 14. an "heretic and lollard" held not actionable: no indictment lies for being a papiſt, *Jones* 308, Why ſhould not an action lie as well for calling a man "puritan" or "conventicler?"

(*a*) 2 Roll Abr. 65. pl. 7.
(*b*) 13 Co. 59.
(*c*) But this ſtatute is now repealed by 9 Geo. 1. c. 5. See 1 Hawk. P. C. ch. 3.
(*d*) Hutton, 52.
(*e*) 1 Sid. 67. 1 Lev. 72.
(*f*) Cro. Jac. 56. Yelv. 57.
(*g*) 1 And. 119.
(*h*) Cro Jac. 90.
(*i*) Cro. Jac. 240.
(*k*) Cro. Eliz. 313.
(*l*) Cro. Eliz. 883.
(*m*) Moor, 401.
(*n*) Cro. Car. 291.
(*o*) 1 Leon. 187.

MR.

Row v. Clargis.

Mr. North *è contra.* A papiſt may be convict without ſummons or being heard, upon proclamation, which may be all done on a common report: the rule is, not that they muſt imply a conviction, but that they charge with ſuch a crime as may ſubject him to proceſs, as "thief" or the like. "A papiſt" ſignifies "a traitor," one that oppoſes the king's ſupremacy, as it was uſed in king *Henry the Eighth's* days; and it is now uſed to diſtinguiſh allegiance, and not opinions: a deputy lieutenant hath a great truſt, and he is to diſarm papiſts and ſuſpected papiſts; and words of a juſtice are actionable (though no office of profit) if ſpoken *reſpectu officii. Cro. Eliz.* 191.

* All the Court inclined that they were actionable; and the judgment was afterwards affirmed. (*p*) * [252]

(*p*) See the caſe of Sir John Cutler v. Friend, ante, 140.

Ingram *againſt* Skinner and his Wife. Caſe 252.

Trinity Term, 34 Car. 2. Roll 1159.

Pleading.

Debt on a bond againſt *Skinner*, and *Grace* his wife, as executors of the teſtament of *John Dingley*, for four hundred pounds.

After a ſpecial imparlance the defendant pleads in *abatement*, that *Grace* the defendant, and one *Francis Bingham* were executors, and that both proved the will and adminiſtered; but does not ſay that *Francis Bingham* is living.

The plaintiff by proteſtation *quod* Franciscus *nondum ſuperſtes et in vita exiſtit prout in placito præd. allegat.* (but it is not ſo alledged there) *pro placito dicunt* that *Francis* died before the bill exhibited.

And upon this there is a demurrer. *Vide poſt.*

Pagram's Caſe. Caſe 253.

Judgment upon an old warrant of attorney cannot be entered without leave of the Court, or affidavit of the party being alive 1 Mod. 1.

In caſe of a warrant of attorney to confeſs a judgment; after a year judgment is not to be entered up without leave of the court, upon motion, and affidavit of the party's being living, eſpecially the defendant or the conuſor, as alſo that the debt is not ſatisfied. Accordingly I moved one *Pagram's caſe* this term, which the Court granted.

Memorandum.

Lord Nottingham dies, and is ſucceeded by North. Raym. 474.

ABOUT *Chriſtmas* in this vacation the Lord Chancellor Nottingham died, and in his room was Sir Francis North made Keeper of the Great Seal;

Pemberton made C. J. of C. B.

And in his place ſucceeded Sir Francis Pemberton, being made Chief Juſtice of the Common Pleas.

Saunders made C. J. of B. R.

And in his place ſucceeded Sir Edmond Saunders, being made a ſerjeant in order to it the firſt day of Hilary Term; and his ſerjeant's rings had this motto, *principi ſic placuit*, and the ſame day was made Chief Juſtice of the *King's Bench*,

The Thirty-fourth and Thirty-fifth of Charles the Second,

IN

THE KING's BENCH.

Sir EDMOND SAUNDERS, *Knt. Chief Juſtice.*

Sir THOMAS JONES, *Knt.*
Sir WILLIAM DOLBEN, *Knt.*
Sir THOMAS RAYMOND, *Knt.*
} *Juſtices.*

Sir ROBERT SAWYER, *Knt. Attorney General.*

HEANAGE FINCH, *Eſq. Solicitor General.*

Duncomb *againſt* Walter.

Caſe 254.

CASE by aſſignees of commiſſioners of bankrupts: ſpecial verdict in the court of Common Pleas, and judgment for the defendant there; and writ of error brought here.

The verdict finds *Staley* the goldſmith, a trader, and the king's ſubject, and to be indebted to one *Clarke* in a thouſand pounds. *Clarke* dies, and makes *Crew* his executor, who arreſts *Staley* upon a *bill of Middleſex:* he puts in bail. *Crew* then proves the will before the return of the writ, and then *Staley* renders himſelf in diſcharge of his bail, and lay in priſon two years, not paying or ſatiſfying the debt.

An arreſt made by an executor before probate obtained, is good, as between the parties themſelves, but not to affect the intereſts of third perſons; and therefore if a perſon ſo arreſted be a trader, and give bail to the arreſt, and afterwards ſurrenders in diſcharge of his bail, and lies in priſon two months, it ſhall not be an *act of bankruptcy* from the firſt arreſt, ſo as to avoid a payment made by the bankrupt to another creditor on the day that probate was granted; but if the arreſt under ſuch circumſtances be legal, the act of bankruptcy ſhall relate to the time of the ſurrender.——S. C. 3 Lev. 57. S. C. Raym. 479. S. C. 1 Freem. 539. S. C. 3 Vent. 370. S. C. Skin. 22, 87. Poſt, 512, 3 Lev. 13. 1 Salk. 109.

The

DUNCOMB v. WALTER.

The queſtion was, Whether he was a bankrupt from the time of the arreſt? The clauſe of the ſtatute 1 *Jac.* 1. *c.* 15. is, "if he "ſhall lie in priſon ſix months from his arreſt, &c."

It was argued that he ſhould be a bankrupt from the firſt arreſt: here he renders himſelf before the return of the writ, and two months after his arreſt: his putting in bail is nothing to the creditors; they can make no uſe of the bail; though *Crew* had not then proved *Clarke's* will, yet the jury have found it *juſtum et verum debitum*, and it is *debitum* before probate: he is executor by the act of the party, and not by the act of law, as an adminiſtrator is: he may be defendant before probate, and plaintiff ſo as to bring a writ, though he cannot * declare; and here the will is proved before the return of the writ, and that is well enough; for before that time there is no action pending in court: here in this court the writs both of *latitat* and *bill of Middleſex*, are general, and not as executors; now when the will was proved it has relation to the death of the teſtator, ſo that the arreſt was good *ab origine*. *Roll Abr.* 517.

* [254]

WALCOT *Serjeant è contra.* Here are two queſtions. FIRST, Whether he be within the act of parliament? SECONDLY, As to the point of relation?

As to THE FIRST, an arreſt cannot make a man a bankrupt, for it is no offence to be in debt: they do not find any act done from the time of the arreſt to the rendering himſelf: to make good this action there muſt be two relations from the probate of the will to the arreſt, and likewiſe from the rendering himſelf in diſcharge of his bail to the time of the arreſt: relations are but *fictions* in law, and ſhall never work a wrong or charge to a third perſon (*a*). Judgment was given in the Common Pleas after three ſolemn arguments, and all the judges agreed in opinion for the defendant (*b*).

THE COURT. It is not a ſlight matter; they do not ſo much inſiſt on the relation, as on the words of the act of parliament. The words of the ſtatute 21 *Jac.* 1. *c.* 19. are, "That if a man being "arreſted, do not pay or compound the ſame within ſix months af- "ter due, or being arreſted do eſcape out of priſon, or get enlarge- "ment on common bail, and ſhall lie in priſon two months:" then it ſays, "And in the ſaid caſes of arreſt, or lying in priſon for ſuch "debts, and getting out on common or hired bail, he ſhall be a bank- "rupt from the time of the firſt arreſt;" and the judges conſtrued this to be only relative to the two laſt clauſes, and not to the not paying in ſix months after arreſt, and that he ſhould be a bankrupt

(*a*) See 19 Geo. 2. c. 32. ſ. 1.

(*b*) *Walter* the defendant was a creditor of *Staley* the bankrupt, who, after the arreſt by *Crew*, and on the very day that probate of *Clarke's* will was granted, paid to *Walter* the money he owed to him; and all the judges of the Common Pleas agreed, that as between *Crew* and *Staley* the arreſt before probate was good, but that *quoad Walter* it was illegal, and ſo the payment made by the bankrupt to *Walter* good, becauſe he could not be a bankrupt on an illegal arreſt, even if he had laid in priſon inſtead of giving bail. S. C. 3 Lev. 58. But it appears by S. C. Skin. 23. 88. that to conſtitute this ſpecies of bankruptcy, the arreſt muſt be *legal*; and this opinion ſeems confirmed by this caſe. Ex parte Hylliard, 1 Atk. 147.

only

only from his rendering himſelf to priſon; for that the beſt man upon the exchange may be arreſted and put in bail, and afterwards become poor, and ſo be forced to ſurrender himſelf to ſave his bail, and it will be hard to conſtrue him a bankrupt from the firſt arreſt when he was able.—And judgment was affirmed (*c*).

But as to the other point they held an executor has the ſame right before as after probate, and he * may make an avowry for rent before probate.

An executor has the ſame right before as after probate. Term. Rep.

* [255]

(*c*) The judgment given for the defendant in the court of Common Pleas was affirmed. S. C. 3 Lev. 58. principally upon the point of relation; for the Court ſaid that it would be a great miſchief if the bankruptcy ſhould relate to the firſt arreſt, or to the payment of money to ſtrangers, S. C. 1 Vent. 371; beſides, the relation to make a man a bankrupt, ought to be upon an *actual impriſonment*, and not upon the *conſtructive impriſonment* on putting in bail; for in the firſt caſe, every one hath warning of the trader's ſituation, but in the ſecond he continues to appear publicly and affords no notice, S. C. Skin. 88. But ſee the caſe of Smith v. Stracy, 1 Salk. 110. where HOLT *Chief Juſtice*, who was counſel in the above caſe, is made to ſay that he was diſſatisfied with the judgment; and Hill v. Siſh, poſt, 524. where it is ſaid that the judgment was given on the ground of the arreſt being illegal. This deciſion, however, ſeems to be confirmed by the ſubſequent caſe on this ſubject, Barwell v. Ward, 1 Atk. 260. Roſe v. Green, 1 Burr. 439. Coppendale v. Bridgen, 2 Burr. 818. King v. Leith, 2 Term Rep. 141. Bull. N. P. 38. But the bail muſt be really put in; for where it is only formal bail, the bankruptcy will have relation to the firſt arreſt. Roſe v. Green, 1 Burr. 439; and ſee upon this ſubject Cooke B. L. 592 to 630. and 2 vol. Mr. Kydd's edit. Com. Dig. 9.

Rogers and his Wife *againſt* Goddard.

Caſe 255.

ASSAULT and battery, for an aſſault on the wife.

LORD SAUNDERS held on the trial of this cauſe in *Middleſex*, being the firſt ſitting this term, that a verdict on a former trial ought not to be read as evidence on *a new trial* in the ſame cauſe; for when a new trial is granted, the old verdict is ſet aſide, and the party pays *coſts* for the ſame (*a*), and the deſign of the Court is, that it ſhould be tried originally, &c.

A former verdict cannot be read in evidence on a *new trial*.

And IT WAS HELD likewiſe by him, that huſband and wife ought not to join in treſpaſs for an aſſault on the wife, if the ſame were with her conſent; for where they join the action ſurvives (*b*). Now here if the huſband die, the wife cannot proceed or begin *de novo* for as in ſuch caſe the action would not ſurvive, they cannot join.——4 Mod. 156. 2 Bulſt. 14. 2 Roll Abr. 556. Stra. 61.

If A WIFE *conſent* to an aſſault, the action muſt be brought by the HUSBAND alone; Cro. Jac. 110.

(*a*) See Bull. N. P. 327. 1 Stra. 642. Pechin v. Pawley, 1 Bl. Rep. 670. Anderſon v. George, 1 Burr. 352. Price v. Shute, 2 Bl. Rep. 695. Buſcall v. Hogg, 3 Wilſ. 146. Vale v. Bayle, Cowp. 297. Harris v. Butterley, Cowp. 485. Sutton v. Mitchel, 1 Term Rep. 20. Jackſon v. Duchaire, 3 Term Rep. 551. Goodnight v. Saul, 4 Term Rep. 359. and the caſe of Tidmarde v. Marſhal, Hullock's Law of Coſts, 383.

(*b*) See Horton and his Wife v. Byles, 1 Sid. 187. and Newton and his Wife v. Hatter, 2 Ld. Ray. 1209. Willy v. Thompſon, Bunb. 277. Weſtbrooke v. Struſville, Strange, 79.

with

ROGERS v. GOODARD.

with this action, becauſe it was *with her own conſent*, and in ſuch caſe therefore the huſband may and ought to bring the action alone upon his ſpecial caſe (*c*), for though the wife conſent, that will not excuſe the defendant; for ſhe has not *poteſtatem corporis ſui*.

HOLT ſaid that the very laſt aſſizes, the LORD CHIEF BARON over-ruled him in that very exception, and ſo ſaid JEFFERYES *Serjeant*, that LORD HALE had done: but the Lord Chief Juſtice VAUGHAN allowed it, and always held they could not join.

(*c*) See Cro. Jac. 501. Jones, 440. Cro. Car. 90, 1 Salk. 206. B. R. H. 54. Fort. 377. Stra. 977. 2 Com. Dig. "Baron and Feme," (W.)

Caſe 256. The King and Chiſwick *againſt* The Inhabitants of Bitton.

Pleadings on a writ of noctanter.
2 Inſt. 476.
Bull. N. P. 217.
Lutw. 144. 157. 376.
Cro. Car. 280. 440.
3 Sid. 107. 212.
3 Lev. 168.
1 Mod. 66.
B. R. H. 355.
3 Com. Dig. "Common," (G.)

A WRIT was awarded to the adjacent vills, on the *ſtatute of Weſtminſter the ſecond*, for reparation of fences thrown down in the night,

The defendants being *A. B.* and *C.* come, and, alledging themſelves to be inhabitants there, plead that *Sir John Newton* for himſelf and his tenants of ſuch a manor, had common *in loco quo*, &c. and that it was incloſed (*a*), and that they demoliſhed theſe incloſures in the day-time, ABSQUE HOC that they in the night did throw down * thirty perch,

To which there were exceptions taken,

FIRST, They were no proper perſons,

SECONDLY, That the traverſe is ill, becauſe it does not ſay "*aut aliquam inde partem*," and ſo tie it up to the number, and make the number the ſole matter.

* [256]

A *noctanter* will not lie for cutting down timber trees.
5 C. Raym. 487.

But MR. JUSTICE JONES took exceptions to the writ,

FIRST, That it was for trees growing, which is not within the ſtatute.

SECONDLY, The writ is brought too ſoon, the proſtration is laid to be *the firſt* of *December et diverſis vicibus* to the *twenty-firſt*, and the writ is the *ſixteenth*.

(*a*) See the ſtatutes 29 Geo. 2. c. 36. and 31 Geo. 2. c. 41.

The

The King *againſt* Eve. Caſe 257.

Order for the maintenance of a baſtard child. Ante caſe 111. Mich. 34 Car. 2.

ESSEX *ſſ.* CAROLUS SECUNDUS *dei gratia Angliæ Scotiæ Franciæ et Hiberniæ Rex Fidei Defenſor, &c. cuſtod. pacis noſtræ ac juſticiariis noſtris ad diverſ. felonias tranſgreſſiones et alia malefacta in comitatu noſtro Eſſex perpetrat. audiend. et terminand. aſſignat. et cuilibet veſtrum ſalut. volentes certis de cauſis omnes et ſingulos ordines verſus quendam* JOHANNEM EVE *concernent. manutenent. cujuſdam ſpurii per ipſum gigni ſuppoſit. per vos ſeu aliquos veſtrum nuper fact. ut eſt dict. coram nobis per vos mitti vobis et cuilibet veſtrum mandamus quod omnes et ſingulos ordines præd. cum omnibus eos tangentibus adeo plene et integre prout coram vobis ſeu aliquibus veſtrum nuper fact. fuerunt et penes vos jam reſident quocumque nomine idem* JOHAN. *nuncupetur in eiſdem coram nobis ſub ſigillis veſtris aut unius veſtrum a die Sancti Michaelis in tres ſeptimanas ubicunque tunc fuerimus in Anglia mittatis ſeu unus veſtrum mittat una cum hoc breve ut ulterius inde fieri faciam. quod de jure et ſecundum conſuetudinem regni noſtri Angliæ fore viderimus faciend'; teſte* FRANCISCO PEMBERTON *apud Weſtm. 5 Julii anno regni* 34.

MEMORANDUM, *quod ad generalem quarterialem ſeſſionem pacis domini regis tent. pro. com. prædict. apud* CHELMESFORD *in eodem com. die Martis prox. poſt feſtum Sancti Michaelis exiſtent. 3° die Octobris anno regni domini noſtri Caroli Secundi die gratia Angliæ, Scotiæ Franciæ et Hiberniæ regis fidei defenſor', &c.* 34. *coram* CHRISTOPHERO DUCE ALBEMARLE RICHARDO BARRET *Arm.* B. C. *et* D. E. *et aliis ſociis juſticiariis dict. domini regis ad pacem in com. prædict. conſervand. * necnon ad diverſ. felonias tranſgreſſiones et alia malefacta in eodem com. perpetrat. audiend. et terminand. aſſignat.* ALEXANDRUS PRESCOT *et* JOHANNES TENDERING *duo juſticiarii ad pacem in com. prædict. conſervand. aſſignat', &c. per manus ſuas proprias deliberaverunt hic in cur. quendam ordinem per eos fact. unde in brevi huic ſchedul. annexat. ſit mencio et ſequitur in hiis verbis ſequentibus.*

* [257]

" ESSEX *ſſ.* The order of *Alexander Preſcot* and *John Pen-*
" *dering*, Eſquires, two of his majeſty's juſtices of the peace for the
" ſaid county of *Eſſex*, one being of the *quorum*, and next inhabit-
" ing unto the pariſh of *Springfield* in the ſaid county, made the
" twenty-fifth day of *Auguſt*, 1682, for the relief of the ſaid pariſh,
" and for the keeping of a baſtard female child, begotten of the body
" of *Jane Taylor*, ſingle woman, and born in the ſaid pariſh of
" *Springfield* on the twenty-ſecond of this inſtant *Auguſt*, and left to
" the charge of the ſaid pariſh: FORASMUCH as it appears unto us
" by the oaths of *Martha Goldſmith*, *Mary* the wife of *John Bragg*,
" and *Jane* the wife of *Joſeph Stoakes*, on the twenty-fifth of *Au-*
" *guſt* aforeſaid; that *John Eve* of *Springfield* aforeſaid, is the fa-
" ther of the ſaid female baſtard child, and no other man hath had
" the

KING v. EVE.

" the carnal knowledge of her body; we do therefore adjudge and " declare the ſaid *John Eve* of *Springfield* aforeſaid, to be the re- " puted father of the ſaid baſtard female child, and do order him the " ſaid *John Eve*, to pay weekly, from the birth of the ſaid child, the " ſum of two ſhillings and ſix-pence unto the OVERSEERS OF " THE POOR of the ſaid pariſh of *Springfield*, for the time being, or " one of them, for the maintenance of the ſaid baſtard female child, " unleſs the ſaid *John Eve* ſhall otherwiſe diſcharge the ſaid pariſh " of ſuch burden as may accrew thereunto, by reaſon of ſuch baſtard " child. And we further order the ſaid *John Eve* to pay the ſum " of forty ſhillings towards the extraordinary charges of the lying-in " of the ſaid *Jane Taylor*. And laſtly, We order the ſaid *John* " *Eve*, do immediately put in ſufficient ſurety for the due perform- " ance of this our order: given under our hands and ſeals, &c."

I MOVED to quaſh this order.

An order of maintenance need not ſtate that the two juſtices were *the next*, &c.

FIRST, Becauſe it does not ſay that the two juſtices were *the next*, but only one of them.

* THE COURT. That is well enough: here it is ſo, " next in- " habiting" ſhall refer to both the juſtices.

* [258]

An order of maintenance " *till he ſhall* " *diſcharge the* " *pariſh*," is good.

SECONDLY. Becauſe it does not ſay how long the payment ſhall be, and in *Style* 184, an order was quaſhed for this.

But THE COURT was of opinion that it was well enough, for it is " till he ſhall diſcharge the pariſh," which is well enough.

1 Sid. 363. 1 Vent. 48. 2 Vent. 210. Comb. 69. 103. 2 Salk. 478. 1 Bott. P. L. 434.

An order of maintenance to pay ſo much *weekly*, and alſo a *groſs ſum*, is good.
2 Vent. 210.

THIRDLY. Becauſe there is a ſum ordered beſides the weekly payment.

THE COURT. That is well enough; and has been ruled often and often, that the reputed father ought to pay the extraordinary charges.

The ſecurity muſt be to perform the order, *or* to appear at ſeſſions.
Ld. Ray. 858.
3 Salk. 66.
1 Bott. P. L. 416.

FOURTHLY. Here is ſecurity ordered to be given for the performance of this order, whereas in *Smith's caſe* (*a*), the Court held that the recognizance ought to be in the diſjunctive, *viz.* to perform the order, OR to appear at the next quarter-ſeſſions to abide the order there (*b*), for the binding him to perform the order is to exclude him from the benefit of his appeal to the quarter-ſeſſions.

And of this opinion was ALL THE COURT.

An order of baſtardy may be *quaſhed* in part, &c. ——— 2 Bulſt. 355.

Then MR. JUSTICE JONES ſaid, we will quaſh that part, and confirm the other part, as we well may.

(*a*) Michaelmas Term, 6 Car. 1. in B. R. 2 Bulſt. 342.
(*b*) See 18 Eliz. c. 3. ſ. 2. and 6 Geo. 2. c. 31. 1ſt vol. Mr. Conſt's edit. Bott's Poor Laws, 385.

Smith

Smith *againſt* Batterton. Caſe 258.

TRESPASS for throwing down and ſpoiling certain ſtands of the plaintiff in a fair; a verdict was given for the plaintiff with five ſhillings damages.

In treſpaſs for deſtroying ſtands in a fair, though annexed to the freehold, the plaintiffs ſhall have *full coſts*, though damages are under *forty ſhillings*, if the judge do not certify.

Upon motion to have *full coſts* IT WAS HELD, That the plaintiff ſhould have his full coſts, for that it was *a chattel* and out of the ſtatute 22 & 23 *Car.* 2. *c.* 9. (*a*); and if it had been annexed to the freehold, yet, if carried away, it would be likewiſe out of the act. And in ſuch caſe, where it appears in the record, the *poſtea* need not be marked.

S. C. Ray. 487. S. C. 2 Jones, 282. S. C. Skin. 100. 1 Salk. 208.

(*a*) See Orpwood v. Holden, 3 Keb. 389. Ven v. Phipps, 1 Salk. 208. Keen v. Whiſtler, 1 Stra. 534. Gilb. Eq. Rep. 197. Colethurſt v. Hayes, Carth. 225. Roſſeter v. Bolling, Caſes Pract. B. R. 24. Park v. Davis, Caſes Prac. B. R. 49. Harper v. Jiffer, Annally's Rep. 375. Aſſer v. Finch, 2 Lev. 234. Higgins v. Jennings, 2 Ld. Ray. 1444. 2 Stra. 726. Beale v. Moor, 2 Stra. 1168. Kempater v. Deacon, 1 Ld. Ray. 76. 2 Salk. 665. Cockerel v. Allderſon, Hultock's Law of Coſts, 86. Redridridge v. Palmer, 2 H. Bl. Rep. 2. and the ſtatute 8 & 9 Will. 3. c. 11. ſ. 4.

The Company of Stationers *againſt* Lee, and others. Caſe 259.

IN CHANCERY, it was moved for *an injunction* to ſtay the ſelling of ſome books imported from *Holland*, &c.

Injunction againſt ſelling books imported.

And it was urged that they had quietly enjoyed the ſole * printing of theſe books from the firſt of *King James* until very lately, and that all particular members of THE COMPANY have diſtinct ſhares and benefit in the printing of them, according to the ſtock they put in, by virtue of a bye-law of THE COMPANY; ſo the trade or gain is not reſtrained to a few: by the ſame bye-law above two hundred pounds a year is always applied for the ſupporting of poor widows and orphans of the ſame company; and they are at two or three hundred pounds a year charge in looking after THE PRESS for the ſervice of the government: beſides, it would be of dangerous conſequence, that *the Hollanders* and other foreigners ſhould print our *primers*, *pſalters*, *almanacks*, and *ſinging pſalms*, for they may and actually do abuſe them, for being at no charge for correcting, and printing in a worſe character and paper, they will underſell *the Engliſh*, and deſtroy our manufacture.

S. C. 10 Mod. 105. S. C. 2 Chan. Caſes, 66. 76. 93. Carter, 89. Skin. 234. 1 Vern. 120. 275.

* [259]

Then they moved againſt a trial of the validity of their patent for theſe reaſons.

It appears by the recital of *King James* ſet forth in the bill, that the ſole printing of *primers* and *pſalters* was in grant before that time by patent to *John* and *William May*, for their lives; then by *Queen Elizabeth* to *Benjamin Ailey* in reverſion for thirty years,

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which was purchaſed by the plaintiffs; then the ſaid patent of the firſt of *King James*, was granted to the plaintiff; afterwards his patent was ſurrendered, and the patent renewed in the thirteenth year of *James the Firſt*. The king hath always had and exerciſed his prerogative in the printing of theſe and ſome other books. In the firſt year of *Queen Mary* there was granted to *Cowood*, the printing of *ſtatutes* and *proclamations*, wherein was recited a former grant; we have here a copy thereof: in the firſt year of *Queen Elizabeth* the like patent to *Jugg* and *Cowood* for ſole printing of them, and likewiſe *bibles*: the ſole printing of *law books* was granted by *Henry the Eighth* to *Tottel*, and enjoyed: all theſe patents have been renewed and continued down ever ſince, and multitudes of men have purchaſed under them. The king is head of THE CHURCH and has a particular prerogative in eccleſiaſtical affairs, and therefore in printing of *primers*, &c. he has a particular prerogative in reſtraining and li-
* [260] cenſing prognoſtications * of all ſorts; and were it otherwiſe it would be of dangerous conſequence to the government. In the ſtatute 21 *Jac.* 3. *c.* againſt illegal and miſchievous *monopolies*, it is particularly declared, that this ſtatute ſhould not extend "to "patents for *ſole printing*. In the caſe of *Darcy v. Allen* about monopolies (*a*), the patents for printing, which were the ſame as now, were admitted good. By the 14 *Car.* 2. *c.* 33. it is enacted, "That no perſon ſhall imprint or import any book or books, which "any other perſon by force or virtue of any letters patents, or "entry in the ſtationers book had right and privilege ſolely to "print:" although this ſtatute be expired, yet it ſeems to amount to a judgment, that ſome perſons by letters patents had a right and privilege ſolely to imprint ſome books. Since this ſtatute there was a conteſt between *Mr. Titon* and divers other bookſellers, and *Colonel Streater* patentee of the *law books* (*b*), about the printing of *Croke's Reports*; and, in an action brought, there was a ſudden judgment againſt *Colonel Streater* in the court of King's Bench; but upon a writ of error in parliament, and hearing of counſel this judgment was reverſed, and the patent adjudged good. In Hilary Term, in the twenty-third and fourth years of *Charles* the Second, in the caſe of *Mayo v. Hill* (*c*), an action *tam quam* was brought for the penalties of the act of 14 *Car.* 2. *c.* 33. ſetting forth, that the now plaintiff by virtue of the new letters patents, was proprietor of the copy-right of the *Engliſh bibles* and pſalms, and that the defendant had, &c. And upon trial before the LORD HALE, it was found for the plaintiff by the direction of the LORD HALE, who thereupon declared the patent had been always held legal. In Michaelmas Term, in the twenty-ſeventh year of *Charles the Second*, the *Company of Stationers* brought an information in the court of Common Pleas, againſt one *Seymour* (*d*), for the penalties of the act of 14 *Car.* 2. *c.* 33. for printing and vending of *almanacks*; ſetting forth, that by virtue of the letters patents in the thirteenth year of *James the Firſt*, they were entitled to the ſole printing of *al-*

(*a*) In 24 Eliz. Moor, 673. Noy. (*c*)
(*b*) Skin. 234. cited 1 Mod. 257. (*d*) 1 Mod. 257.

manacks,

manacks, and a ſpecial verdict found thereupon: and judgment for the plaintiff (*e*).

* Now by all theſe judgments ſo affirmed, it appears that the reſpective letters patents gave a right to the patentees, elſe no judgment could have been given for them. So upon the ſtatute 14 *Car.* 2. *c.* 33. which gives the penalties to thoſe who have a right by force and virtue of letters patents. In Eaſter Term, in the thirty-ſecond year of *Charles the Second*, THE COMPANY brought an action on the caſe againſt *Marlow*, ſetting forth their patent of the thirteenth year of *James the Firſt*, and that *Marlow* had printed and ſold *almanacks*; which action was tried before THE LORD KEEPER, then Chief Juſtice of the Common Pleas; and a verdict for the plaintiff. There is objected the ſtatute 35 *Hen.* 8. *c.* 15. reciting that by an act of *Richard the Third*, all ſtrangers might import and ſell books; and that by the ſaid act of 35 *Hen.* 8. *c.* 15. it is enacted, "That none ſhall buy to ſell again any imported books "ready bound, otherwiſe than in groſs, and not by retail," whence they infer that it is lawful to import any books in ſheets. The anſwer is, that that ſtatute of *Richard the Second* is not in print: *quære*, if it be perpetual. But, however, it extends only to ſtrangers, and it will not take away the king's prerogative, the king being not named in the act; and as for that of 35 *Hen.* 8. *c.* 15. it cannot be of greater force for that very reaſon: beſides the ſtatute is only prohibitory, and does not inlarge but reſtrain the liberty of the ſubject: the judgments in the Houſe of Lords, and other courts where theſe ſtatutes were objected, prove that they do not take away the king's prerogative. If the words of the ſtatute imported a general liberty for all ſorts of books, the defendants might inſiſt to import any ſeditious or heretical books, which by law they cannot do; ſo that the liberty of importing books muſt be reſtrained to ſuch as are not contrary to the king's prerogative and the weal public. * [261]

And an injunction was granted.

(*e*) But ſee Stationers Company v. Carnan, 2 Bl. Rep. 1004. where on a caſe ſtated out of Chancery the judges of the Common Pleas certified, that the patent made to the Stationers Company, in the thirteenth year of James the Firſt, was reſtrained to the printing of ſuch *almanacks* and prognoſtications as ſhould be licenſed and allowed by the Archbiſhop of Canterbury, the Biſhop of London, or either of them, for the time being. SECONDLY, That the Crown had not the prerogative or power to make ſuch grant to the Company, excluſive of any other or others. See alſo the Stationers Company v. Partridge, 10 Mod. 105. and 4 Burr. 2382 2402.

* The King *againſt* Pilkinton, Shute, and others.

Caſe 260.

* [262]

INFORMATION for a riot at *Guildhall* (*a*). And now the cauſe being called, the defendants offered a challenge, *viz.* on the behalf of my *Lord Grey*'s being a defendant, and being A PEER, that *peer* for a miſdemeanor, that no *knights* were returned on the jury.——S. C. Skin. 117.

It was formerly a good cauſe of *challenge* on the indictment of a

(*a*) See a copy of the information, Trem. P. C. 182. 6 State Trials, App. 40. 3 State Trials, 630.

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there was no *knight* returned on the jury as there ought to be (*b*). And it was put in *Latin*, in parchment, and read by the clerk, and received by my LORD SAUNDERS, for that he was of opinion, that to have *knights* of the jury was the privilege of A PEER in *a criminal* as well as in *a civil* cauſe; as is 1 *Leon.* 7. and ſeveral other authorities; and the caſe in *Dyer* ſays, it is ſuch a privilege as he cannot waive, for if he be plaintiff the defendant may challenge *the array* for this default (*c*).

In what caſe a *non proſ.* cannot be entered on a criminal information.

And THE ATTORNEY GENERAL (*d*) here could not enter a *non proſequi* as to him: for here he has no day, nor is it *the record* that is here, but only *a tranſcript* ſent hither for the particular purpoſe of a trial: and the judge here has nothing to do but to record the verdict, or to receive a plea *puis darrein continuance*, nor can a *non proſ.* be entered as to my *Lord Grey*, for that the *venire* is joint, and the iſſue is ſo too.

(*b*) But now by 24 Geo. 2. c. 18. "no *challenge* ſhall be taken by a peer or "lord of parliament to any panel of ju- "rors, for want of *a knight* being returned "on ſuch panel; nor any *array* quaſhed "by reaſon of ſuch challenge."

(*c*) But ſee S. C. 6 State Trials, 631.

(*d*) Sir Robert Sawyer.

Caſe 261. Rich *againſt* Player.

A *bill of exceptions* lies on a *challenge* being overruled. Poſt, 286. Skin. 104. 1 Vent. 366. Ray. 484.

INDEBITATUS ASSUMPSIT for an hundred pounds. The defendant challenges THE ARRAY, for that the *venire* was directed to *Sir Dudley North*, one of the ſheriffs of *London*, on a ſuggeſtion that the plaintiff was the other ſheriff.

IT WAS ALLEDGED *for the defendant*, that the office was but one intire thing, though exerciſeable by two. But the challenge was ſaved to them by allowing a bill of exceptions.

The bye law of London, that a ſheriff, choſen after a fine paid, ſhall have a portion of the fine, is good. 10 Co. 31. Hob. 211. 5 Mod. 439. B. R. H. 284. 1 Burr. 235.

THE CASE was on an ordinance of the common-council, that if a freeman be choſen ſheriff, and upon refuſal be fined, the next younger ſheriff that holds ſhall have a hundred pounds of his fine. *Mr. Box* was choſen and fined, and paid four hundred pounds to the chamberlain. *Rich* was afterwards * choſen younger ſheriff, and by the order of the court of aldermen upon his petition was to have a hundred pounds thereof, which being demanded of THE CHAMBERLAIN was refuſed, and thereupon the action was brought, and a verdict for the plaintiff.

* [263]

The defendant inſiſted upon *the challenge*, and therefore made no defence (*a*).

(*a*) See S. C. Poſt, 286.

The King *againſt* The Mayor and Commonalty of the City of London.

Caſe 262.

KING'S BENCH, *Michaelmas Term*, 33 *Car.* 2. *Roll* . CROWN SIDE.

QUO WARRANTO for claiming, *inter alia*, to be A CORPORATION, and, after a ſpecial plea of ſeveral acts of parliament and charters, ſome forfeitures were aſſigned; then a rejoinder, ſurrejoinder, &c. and demurrer (*a*).

A corporation aggregate may be forfeited by a breach of the truſt upon which it was granted; and the CORPORATION OF LONDON is in this reſpect like every other corporation; and therefore if the mayor and common council extort, under pretence of a bye law, money from all the king's ſubjects who ſhall reſort to the city markets, or make and publiſh a ſcandalous and libellous petition, it is a forfeiture of their franchiſes, for the acts of the mayor and council are the acts of the corporation, for which an information in *quo warranto* may be maintained; and on judgment for the king, the franchiſes may be ſeized into the king's hands.

FINCH *Solicitor General* argued for the king.—We ſhall firſt conſider ſome preparative queſtions, which ſome at THE BAR have made ſo, otherwiſe I ſhould not.

FIRST, Whether any corporation can be forfeited at all: now no corporation has any other foundation or ſubſiſtence than other franchiſes, and there is a ſecret truſt that they ſhall not be abuſed, otherwiſe there would be a great miſchief: the king is the head and original of all corporations and franchiſes (*b*). A preſcription to be a corporation ſuppoſes it to be derived from THE CROWN: there is no rule more certain, than that a franchiſe may be forfeited. By the Year Book (*c*), the *Second Inſtitute* (*d*), and the *Mirrour* (*e*), there cited, an abuſer of *murage* is a forfeiture thereof, and that by the common law, for the ſtatute of *Weſtminſter the Firſt*, *c.* 31. is but an affirmance of the common law; it only adds a further puniſhment, *viz.* to be grievouſly amerced for an abuſer (*f*). The abbot of *St. Alban*'s franchiſe of having a gaol was ſeized into the king's hands for an abuſer thereof (*g*). By PIGOT, If the conuſance of pleas be granted, and he does otherwiſe than he ought, he ſhall loſe his franchiſe (*h*). Non-uſer or abuſer is a forfeiture * of an office (*i*). In *Fitzherbert* (*k*) it is ſaid, that a biſhop's temporalities and franchiſes may be forfeited: thus far it is plain that franchiſes miſuſed may be forfeited, although they are enjoyed by a corporation, and in a corporate capacity; unleſs ſome will ſay that a corporation cannot forfeit the franchiſe of being a corporation, which certainly may be done as well as a gaoler forfeit his office of being a gaoler: ſuppoſe a corporation ſhould, under the common ſeal, authorize a rebellion, would not this be a forfeiture? In the Year Book (*l*) it is ſaid, that a corporation cannot commit a battery, or do a perſonal wrong, and this is true, but yet they may do a corpo-

S. C. 3 St. Tr. 545. S. C. 6 St. Tr. 16. S. C. Co. Ent. 535. Kyd. ch. 5.

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(*a*) See the pleadings, &c. in "the "caſe of the *quo warranto* againſt the "CITY OF LONDON."
(*b*) Keilway, 138.
(*c*) 18 Edw. 2. "Quo warranto."
(*d*) 2 Inſt. 233.
(*e*) The Mirrour of Juſtice, cap. 5. ſect. 4.
(*f*) Year Book, 8 Hen. 4. pl. 18.
(*g*) Year Book, 20 Edw. 4. pl. 6.
(*h*) Year Book, 12 Hen. 4. pl. 1.
(*i*) Moor, 193.
(*k*) Fitz. Abr. title "Corone," pl. 233.
(*l*) 21 Edw. 4. pl.

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rate act which may be unwarrantable, yea illegal. A corporation may be ſurrendered, and that which may be ſurrendered may be forfeited (*m*). In Lincoln's Inn library, in LORD HALE's collection of *Adjudicata* of *Edward the Firſt*, *fol.* 28. there was a judgment "*quod libertas de* SANDWICH *forisfacta ſit*," and by him marked in the margin, "*et eorum judicium videtur extendere* to THE "CINQUE PORTS:" and theſe are confirmed by act of parliament as well as the city of *London*: all *quo warrantos* hitherto have ended in ſubmiſſion. In 5 *Edw.* 4. *c.* 6. if a corporation ſhould neglect to come in during *the eyre*, or into the king's court, it is a forfeiture, which being ſo, it is ſtrange that oppreſſions, though outragiouſly committed by corporations, ſhould not be ſo (*n*).

SECONDLY, Whether the city of *London* be in any other plight than other corporations? And I think it the ſame: this depends on their plea and the ſtatutes mentioned therein. The *fourth Inſtitute* (*o*) mentions the ſtatute of *Richard the Second*, likewiſe the firſt MAGNA CHARTA is no more a confirmation to them than to any other, for it is "*et omnes aliæ libertates*," and LORD COKE and THE MIRROR ſay, that they ſhall have all them which they have not forfeited by any abuſer (*p*). As for the other acts it is plain that in the twenty-fifth year of *Edward the Firſt* (*q*), the city was forfeited, and in the twenty-ſixth year (*r*) he reſtored their liberties and their city * to them to hold during his pleaſure: he cited 14 *Edw.* 2. *Membr.* 21. 2 *Part Patent Rot.* 16 *Edw.* 2. 20 *Edw.* 2. *Pat. Rot.* It was reſtored by the grace of the king, but never by due courſe of law: as to the act of 1 *Edw.* 3. *c.* which they ſet forth, I know no ſuch act; there is no ſuch printed; nor are there any parliament-rolls till long after that, *viz.* the fourth year of *Edward the Third*. He cited 5 *Edw.* 3. *Rot. Clauſ. Membr.* 14. As to the 7 *Rich.* 2. *pl.* though LORD COKE (*s*) ſays it is a ſtatute, and cites ſeveral books in the margin, yet never one proves it, or tends thereto; he ſays, "*Rot. Parliam.* 7 *Rich.* 3 *Mem.* 37." whereas that is only a prayer of the commons, that a patent to that purpoſe be granted to the *city of London*, and the king ſays "*le roy* "*veut*," but there was never ſuch a patent granted; and if there was, it can be interpreted only to extend to paſt forfeitures, not to future ones: and in the ſixteenth year of *Richard the Second* they were ſeized *per debitum legis proceſſum* (*t*); by which it appears, that notwithſtanding their pretended ſtatute they were *de facto* forfeited. In the ſecond year of *Richard the Second* (*u*), a petition from the city was preſented in parliament, that they might not be forfeitable, and the anſwer was "*Le roy aviſera*:" which argues that they

* [265]

(*m*) 12 Edw. 3. Rot. Clauſ. Membr. 26. 12 Edw. 3. Rot. Clauſ. Membr. 5. Eaſter Term, 9 Edw. 1. Roll. 95.

(*n*) See the caſe of the Earl of Glouceſter v. the Earl of Hereford, Hilary Term, 20 Edw. 1. ſc. 6 and 7. Ryley's Parliamentaria Placita, 83 and 86; and 21 Edw. 3. Rot. Clauſ. Membr. 17.

(*o*) 4 Inſt. 253.

(*p*) See 2 Inſt. 20.

(*q*) 25 Edw. 1. 2 Part of the Patent Roll Membr. 14.

(*r*) 26 Edw. 1. Rot. Pat. Memb. 6.

(*s*) 4 Inſt. 253.

(*t*) 16 Rich. 2. Rot. Pat. Memb. 22.

(*u*) 2 Rich. 2. Parliam. Rot. 128. 131.

had

had no ſuch before; and they pray likewiſe that which was never before or ſince prayed, *viz.* that they might interpret their own charters, and it was denied.

THE THIRD QUESTION is, Whether the act of the mayor and common-council may be termed the act of the whole: all bye-laws are corporate acts, and made by the whole, and yet they are made by the common council; and when for their purpoſe are defended as good; and ſo they have been allowed in the king's courts: they have pleaded that they have time out of mind a common-council: it is an inſeparable incident to corporations to make bye-laws, and a power to make them is implied in the very being of a corporation; and therefore a miſuſer of that is a miſuſer or forfeiture of the whole (*w*). When divers franchiſes are dependant one on another, the miſuſer of one of theſe is a forfeiture of the whole (*x*). Toll is incident to a market; and an abuſer of *the toll* is a forfeiture of *the market.*

* THE FOURTH QUESTION is, Whether the acts done by this corporation, alledged in our replication, and confeſſed in their rejoinder, be a forfeiture? * [266]

FIRST, As to the making of the bye-law, and levying money in purſuance thereof: and now what right have they to ſuch tolls? and this as they have pleaded is none at all; a preſcription to toll, without ſaying what in certain is void; and ſo is a grant from the king of ſuch uncertain toll (*y*); for no man can pretend to tax his fellow ſubject, nor is this which they pretend to a toll, for a toll is to be paid by the buyer, but this is to be paid by the market-people, the ſellers; yet I agree there muſt be a cuſtom for *ſtallage*, but that muſt be certain, as is 9 *Hen.* 6. 45. *pl.* 28. expreſsly in the point: but ſuppoſing it a good preſcription, then our traverſe of their preſcription is good, and they ought to have taken iſſue thereon; whereas they have offered an iſſue to toll uncertain, and have not reduced it to a certainty by their bye-law: when the king has granted a market, he can never after grant toll, becauſe it was once a free market; and when once a market is in the city, that being with a cuſtom for a ſum certain, they can never raiſe it, but may leſſen it; ſo that the queſtion will be, whether raiſing and levying of money be a forfeiture? It is a breach of truſt, and an oppreſſion to the people: the offence lies in uſurping a power to make a bye-law for the levying of money, that is the miſuſer: in the *caſe of ſhip-money* (*z*), it was not the quantity, but the manner of levying it without act of parliament, which was the matter complained of: and if this corporation may go thus far, who knows where they may end? As to the petition, the preſenting and printing it is the offence which was done by them as a corporation; it is taking upon them to cenſure the king and his government; it is a ſcandalizing of him: there was the caſe *Colonel King v. Lake* (*a*), in the LORD HALE'S

(*w*) 22 Aſſize, pl. 34.
(*x*) See the caſe of the Corporation of Maidenhead, Palmer, 76, 77, 78.
(*y*) Palmer, 79.
(*z*) 1 State Trials, 483.
(*a*) 1 Mod. 58. 2 Vent. 28. 1 Saund. 131.

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time in this court: the printing any man's case while pending is an offence, because it is as it were an appeal to the people; if the fact be done, the law says maliciously, and with an ill intention: they confess the fact, and then traverse the malice, which cannot be; this would have * been an offence in a private person, and have incurred the penalty of imprisonment, during the king's pleasure. He cited *Harrison's case* (*a*) for it, who was sentenced so, and likewise with a grievous fine for speaking words of *Justice Hutton* in relation to a judgment of his about *ship-money*; much more criminal is it to charge the king with misgovernment: and on the whole matter he prayed judgment for the king.

* [267]

See Mr. Hampden's case, pag. 237, 238.

SIR GEORGE TREBY argued *e contra*.

FIRST. A corporation cannot be forfeited; it is a mere capacity (*b*). In *Brooks's Abridgment* his title is "Corporations and Capacities." Now he never uses two words in his titles but when they are *synominous* (*c*). In one case, and in but one case in the world is it called *a franchise*, and that is in title "*Quo Warranto*," in *Coke's Entries* (*d*). *Ney* calls it *a franchise*, for, says he, it was called so in that plea: they never die (*e*). It is invisible, immortal, and has no soul; so is the case of *Tipling v. Rexal* (*f*). No *subpœna* lies against them, because they have no consciences, they cannot speak nor appear in person, but by attorney; and this was the opinion of MANWOOD *Chief Baron*. *Grotius* says that cities are immortal (*g*). That a corporation should be dissolved was never adjudged, nor questioned, nor attempted before; now in the *first institute* (*h*), a corporation is said to be dissolved. but it is not properly a dissolving, but rather a taking away of the subject in which it subsists: In *Rolle's Abridgment*, there is this *quære*, How it may be dissolved? and no answer (*i*). It cannot by the judgment of the court in a *quo warranto*, but by death of all its members; and in *Littleton*, it is reckoned a good argument that no such action lies, insomuch that it was never seen or heard of (*k*). And in a *quo warranto*, a disclaimer binds the successors (*l*). A corporation in a town is more protected than another's lordship or dignity; it cannot be forfeited, because it is personal; it cannot be surrendered, as was agreed by the Lords in the *Earl of Purbeck's case: Earl of Oxford's case in Jones* 100, 101. a corporation cannot be surrendered: the surrenders in the time of *Henry the Eighth*, were not good, and therefore needed acts of parliament for them: the Dean and * Chapter of *Norwich's case* (*m*) is, though a corporation surrender, yet the corporation remains: in the case of *Fulcher v. Heyward* (*n*), and in *Worthley v. Adams* (*o*), only the land passes by the surrender, and the corporation is not named there. *Roll.* seems to the contrary (*p*), Deanry of *Wells* said to be surrendered. *Walrond v. Pollard* (*q*),

* [268]

(*a*) Cro. Car. 503.
(*b*) Co. Lit. 250.
(*c*) Hob. 210.
(*d*) Co. Ent. pl. 1.
(*e*) Co. Lit. 4.
(*f*) 2 Bulst. 233.
(*g*) Grotius de jure belli, lib. 2. c. 9.
(*h*) Co. Lit. 13.
(*i*) 1 Roll Abr. "Corporation," 514.
(*k*) Lit. sect. 108.
(*l*) Co. Lit. 103.
(*m*) 3 Co. 75.
(*n*) Jones, 166. S.C. Palm. 499, 501.
(*o*) Plowd. 194.
(*p*) 2 Roll. Rep. 101.
(*q*) Dyer 373.

A cor-

A corporation is before it has lands, and continues after all its lands are evicted. In *Rolle's Abr.* (*r*), it is ſaid, the lands came to the king by the ſtatute of diſſolutions; and truly in the caſe of the Archbiſhop of *Dublin v. Brierton* (*s*), it is reſolved by five judges, that the corporation and chapter of *St. Patrick*, was by the gift and ſurrender of the dean and chapter, lawfully diſſolved and determined; and that alſo *abſque conſenſu archiepiſcopi*; which cannot be law, for it can never be without the leave of the biſhop. My *Lord Coke* argues (*t*), that the ſurrender was by act of parliament, otherwiſe it had not been good. The caſe in the *inſtitute* (*u*) was a *quo warranto* brought and ſubmiſſion, &c. (*w*) but then paſſing that, ſome things may be ſurrenderable and yet not forfeitable, as an annuity is. In *Eurſon's caſe* (*x*) all the ſeizures were but till fine and ranſom; and in the interim the king put upon them *a cuſtos*. A corporation is not a liberty that may be ſeized; the king may ſeize the mayor and put in *a cuſtos*, but he cannot ſeize a thing which is not ſeizable: during all theſe times the corporation was *in ſtatu quo*, and were ſued and did ſue, and their courts continued open and free as before and ſince: if they had not ſued a replevin (ſaid) within a year and a day, they had ceaſed to have been a corporation: it is a meer perſonality that cannot be ſeiſed (*y*). As this action is brought there can be no judgment; it is brought againſt us as a corporation for uſurping the franchiſe of being a corporation; that in *Palmer's Rep.* was brought againſt particular men by name, and ſo is that in the *Dublin caſe* (*z*). The writ here ſuppoſes there is no corporation, and yet calls them ſo: In **Hale's* Common-place Book (*a*), and *Coke's Entries* (*b*), there the judgment was *quod in miſericordia*: If the king miſconceive his action the writ may abate (*c*). If it be a forfeiture it muſt relate to the time of the toll taken, and all the acts we have done ſince are void: *Foriſfecerunt* is a new word in a *quo warranto*; in all judgments in *quo warranto* there is and muſt be a fine; and who ſhall be fined here? It is as if an action ſhould be brought againſt huſband and wife; and in the replication the plaintiff ſhould alledge a divorce; firſt to own them a corporation, and then deny them to be one is repugnant: in the caſe of *the King v. Bradwell* (*d*), a *quo warranto* for uſurping to be a company of fidlers; but it was by name: there was that againſt the *Bermuda Company*, but they never appeared: as to the acts of *pickage* and *ſtallage*, they are ſuch uncertain things as cannot be reduced to a certainty. In *Coke's Entries* (*e*), there is a general pleading without any certainty, and yet more might be ſaid of that pleading of a *water-bailiff*, than this for *ſtallage* (*f*). Thoſe in *London* may preſcribe againſt acts of parliament, but other places cannot. The courts

* [265]

(*r*) 2 Roll Abr. 185.
(*s*) Dyer. 282.
(*t*) 1 Leon. 124.
(*u*) 4 Inſt. 228. Rot. Parl. 8 Rich. 2. Membr. 11.
(*w*) See this caſe at large in Davis's Reports 1.
(*x*) Dyer 2. F.N.B. 162. 2 Edw. 3. pl. 28.
(*y*) Lane, 58. 1 Roll Abr. 195.
(*z*) Palm. 1. 2 Roll 113, 115, 125.
(*a*) Page 168, title "*Quo Warranto.*"
(*b*) Co. Ent. 501.
(*c*) Plow. 85.
(*d*) 18 Car. 2. in B R.
(*e*) Co. Ent. 536. pl. 4.
(*f*) 1 Roll Abr. 206. Palm. 542.

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here have taken notice of the courts of record in *London* (*g*). *Stallage* is paid only for ſtanding, and ſo there is *quid pro quo* (*h*). *Toll thorough* may be preſcribed to in conſideration of repairing the king's way; ſo is the caſe of *Hill v. Hawke* (*i*). We provide ſtalls and ſtanding, and we pay taxes, for the ſoil is ours: by ſeveral books they that have ſtandings only pay no taxes, and ſo is 2 *Roll. Rep.* 238. where *Thomas Heilidge* was ſued in the ſpiritual court for a rate towards reparation of the church, and becauſe he had only a ſtanding a prohibition was granted, for he only came thither on market-days: and by CHAMBERLAIN (*k*) for a man that takes his lodging for a week in a town, he ſhall not be charged to the repairs of the church; by *Lord Coke* (*l*), the ſole and true meaſure of toll is the not hindering * of trade; and I am ſure ours does not, for no market is more filled, nor is there any place where the people have better gain. The duty or tax for hallage of goods at *Blackwell-Hall* in the *Chamberlain of London's caſe* (*m*) is much the ſame with this. Every ſhop in *London* is a market; you cannot judge it unreaſonable; and if reaſonable what miſchief is there to any one? The conſiderations are meritorious and equivalent thereto; an unreaſonable bye-law is no cauſe of forfeiture; it is void and *quaſi non fact.* (*n*) Here is no compulſion of dureſs or impriſonment: if a levying of money were a forfeiture, then we have forfeited our charter continually for ſome hundreds of years; the *majus et minus* work nothing: if this be a forfeiture, it is only of the market, nay, I ſay it is only a forfeiture of the toll: a denizen forfeits only his denizenſhip by, &c. though that be Δῶρον Βασιλικον. *Weſtm.* 2. *cap.* 30, 31. The ſeizure ſhall be only till they redeem by making fine and ranſom (*o*). The being of a corporation is ſo far from being in danger, that in *Sir Julius Ceſar's caſe, &c.* (*p*). As to the petition that is lawful; and ſo is *Wrenham's caſe* (*q*), and the caſe of *Hare v. Miller* (*r*). The petition contains the ſame words in ſenſe and ſubſtance as thoſe ſpoke by the lords and commons, which we ſet forth in our plea: in the *Lord Hollis's caſe* (*s*), theſe words "*ea intentione*" are exploded. In *Cro. Car.* (*t*), a corporation cannot do any thing againſt the peace. Admit that the taking of toll were robbery, what then? 21 *Edw.* 4. 14. cited by MR. SOLLICITOR. By the ſtatute of 19 *Hen.* 7. c. 7. it is moſt plain, for if this making ill bye-laws were a forfeiture of their being a corporation, to what purpoſe then was there an act of parliament to make it a forfeiture of twenty pounds? The common-council are not the whole, for that is a thing collateral to the corporation; as is *Warren's caſe* (*u*), he being an alderman, and one of the counſel of *Coventry*, ſued *a mandamus*; they return that they had a cuſtom to chooſe a common-council,

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(*g*) Spinkle v. Tenant. 1 Roll Rep. 106. 1 Leon. 284. pl. 384. 4 Leon. 182. pl 284.
(*h*) Lord Cobham's caſe, 1 Leon 218. 2 Roll Abr. 123, 261.
(*i*) 1 Roll Rep. 44.
(*k*)
(*l*) 2 Inſt. 58.
(*m*) 5 Co. 62.
(*n*) Hob. 211.
(*o*) Palm. 82. Old N. B. 161.
(*p*) 1 Leon. 106. Co Ent. 525.
(*q*) Hob. 220.
(*r*) Hob. 163.
(*s*) 1 State Trials, 322.
(*t*)
(*u*) Cro. Jac. 540.

and

and to remove them *ad libitum*; and *per Curiam*, there is a difference between an alderman and a common-council-man; they cannot remove a freeman nor an alderman * without cauſe, but to be one of the common-council is a thing collateral to the corporation, and a cuſtom to remove ſuch may be good; and the Court granted a *writ of reſtitution* to reſtore him to his aldermanſhip, but denied it as to the other: The ſame caſe is reported in 2 *Roll. Rep.* 112. and there held as he reports it, that the office of one of the common-council, is only to give his aſſiſtance for the good of the city. There is *Eſtwick's caſe* (*x*), where it ſeems to be for matter of advice: A common-council is merely for counſel (*y*), and all the other power they have is by cuſtom, and then you ſhall no more know what is pleaded: an ill bye-law is void, and if any man be aggrieved thereby an action lies thereon. A cuſtom ſhall never be conſtrued to do a wrong. Although they have the uſe of the common ſeal in many caſes, that is not material; for the court of aldermen has it in ſeveral caſes: Common-council men are choſen by unfreemen, by all that are houſe-keepers, &c. All the truſt they have is to deſtroy, not to maintain their liberties: there is no crime charged that relates to it as a corporation: what is pretended is only an incroachment of property, and what is this to the corporation?

* [271]

LORD SAUNDERS *Chief Juſtice.* Can your corporation do any corporate act? According to your notion never was one corporate act done by them: Certainly whatſoever the common-council does binds the whole; otherwiſe it is impoſſible for you to do any corporate act, for you never do, nor never can convene all the citizens: Your power of making bye-laws is annexed to you as a corporation, and not as lords of the market.

Adjournatur, to be argued again the firſt Friday in the next term.

MR. ATTORNEY GENERAL argued it in Eaſter term for the king, but then I was not preſent.

MR. POLLEXFEN the next day for the defendant.—There is not one precedent, judgment, or opinion, that any one corporation was ever forfeited for any miſdemeanor.

FIRST QUESTION, Whether this information being brought againſt the corporation as ſuch, to know by what authority * they claim to be a corporation, be good? It ought to be brought either againſt their particular perſons by name, or inhabitants of a vill, and then ſome perſons appear and plead by name; and my reaſons for it are theſe: FIRST, The writ ſuppoſes him a body politic, otherwiſe there is no defendant in court; it is not enough that there be a perſon only in ſuppoſition. Suppoſe an information or action againſt huſband and wife, this ſuppoſes them to be ſuch; now if it happen by any of the pleadings to appear on the plaintiff's own ſhewing that they

* [272]

(*x*) Stiles 32. (*y*) See 2 Roll Rep. 246.

are

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are not ſo, the writ ſhall abate. SECONDLY, The very information ſuppoſes that they had a being precedent to that wherewith they charge them. Perſons not *in eſſe* cannot uſurp or do any act: it is true, particular perſons may take upon them to be a corporation: uſurpation is always taken in an unlawful ſenſe (z). Then THIRDLY, From the judgment that muſt be given in this caſe, when brought againſt particular perſons, the judgment deſtroys and damns their being a corporation, with a fine to the king for their offence paſt: in this caſe there cannot be any fine to the king, for the corporation is to be diſſolved by the judgment: the precedents cited in this caſe, and in number twelve, are all, except two, *non proſ.* and *diſcontinuances*; that of *Barking ſted* in *Hertfordſhire* the judgment is by default; that of *New Malton* in *Yorkſhire*, *Trin.* 6 *Jac. Rot.* 3. the judgment is *quod libertates et franchefiæ præd. in manus domini regis capiantur*; and that the mayor and bailiffs ſhall be taken *pro fine*, which I do not at all underſtand; that there ought to be particular perſons named, there are theſe books, *Co. Ent.* 527. *Palm.* 1. 2 *Roll Rep.* 113, 115, 455. *Palm.* 80. 81. LORD HALE's Common-place book in *Lincoln's-Inn* library is expreſsly ſo, *fol.* 168. being a particular *nota* on the report of *Cuſack's caſe*: MR. ATTORNEY would have it, that this is brought againſt particular perſons under that name, but that cannot be intended (a). The writ ſhews itſelf brought againſt the corporation; if it be brought againſt particular perſons under another name, then they appear by particular * name; as in caſe it be againſt inhabitants of a place; this is plain againſt the corporation, they appear by warrant of attorney under the common ſeal. Suppoſing this information well brought, then we are to conſider the replication: There is an iſſue tendered on the preſcription, that they have not been time out of mind a corporation, and then they plead over a forfeiture for levying of money; this is an ill replication, for it contains an iſſue that it is no corporation, and two cauſes of forfeiture alſo. There is no inſtance in the world of ſuch a replication, that there ſhould be an iſſue to the fact, and a pleading over to other matters, either of which ſtrikes to the whole. I cannot find any ſuch ſort of pleading; it is true; the king's attorney may waive his own iſſue, but it muſt be the ſame term (b). By the 9 *Hen.* 4. *c.* 6. the king ſhall be bound by one iſſue and cannot offer one, and then waive it, and offer another: The aſſignment of two forfeitures is ill, for by the firſt act the corporation is gone, which was ſix or ſeven years ſince and then it could not commit another act of forfeiture: Here is a forfeiture, if any, *ipſo facto*: But MR. ATTORNEY was pleaſed to ſay that it is no forfeiture till ſome record or judgment be thereof; then he admits that we are not yet a determined corporation; and if we are yet a corporation, we cannot be ſaid to have uſurped, &c. Then whether the facts alledged in the rejoinder be ſufficient to excuſe and anſwer what is alledged in the replication? MR. ATTORNEY has neither denied or confeſſed in his ſurrejoinder,

* [273]

(z) Co. Lit. 277.
(a) 1 Leon. 153. Hob. 211.
(b) Plowd. 85, 236. Year Book. 13 Edw. 4. pl. 18. and Rex v. Bagſhaw, Cro. Jac. 347, 397.

what

what we have alledged in our rejoinder: I do agree for a lord of a market to preſcribe to have a toll uncertain, and as often as occaſion requires to aſcertain it, would be an ill preſcription; but this in *London* is good; the bye-law in the chamberlain of *London's caſe* (*c*); if it had been in any other city, I doubt if it would have been good; ſo here, as in that of the city of *London's caſe* (*d*), we have averred them to be reaſonable tolls. But it is objected that we have not ſet forth what they are, ſo as the Court might judge it reaſonable or not: in *London* they have * a power to change their markets both as to time and place. * [274]

It is objected as if the ſtatutes we have alledged were not acts of parliament; the 1 *Edw.* 3. 4. is not in print, nor the roll to be found: Private acts are generally not printed: beſides, though they are not rolls we have the very act itſelf under THE GREAT SEAL of *King Edward the Third.* The way then was to ſend them to ſheriffs of counties to have them proclaimed; and afterwards they were inrolled in the general courts in *Weſtminſter*, and this is inrolled in *Trinity Term*, 1 *Edw.* 3. *Roll* 61, 62. in the Exchequer (*e*). There were various forms of penning ſtatutes in ancient times (*f*), and anciently they were in form of grants (*g*), ſometimes in form of articles, and ſometimes in form of petitions (*h*). It is objected that it wants the aſſent of the lords; it appears to be in parliament; it is on the parliament-rolls (*i*). In the *Prince's caſe* (*k*) that act there does not mention the commons' aſſent, and yet it is always agreed to be an act of parliament. Beſides, in the *city books* (*l*) there is an entry of it, and the proclamation thereof is in open court (*m*). Then ſuppoſe this bye-law ill, it is then void and cannot be a forfeiture; a feoffment without livery or inſufficient livery, which is all one, made by tenant for life or years, being a void feoffment is no forfeiture (*n*). The receipt of money not due is but extortion, and puniſhable as ſuch, and the party has his action, the law conſtruing it to be a wrongful taking, and to be received to the owner's uſe: a private perſon in this caſe could only forfeit the toll or market, and be liable to repay the money ſo taken and received. MR. ATTORNEY by his demurrer has confeſſed that the petition was preſented in the manner and for the reaſons we have alledged, it being ſufficiently and ſubſtantially pleaded; and I hear nothing alledged to the contrary. Now ſuppoſe a man in the plague-time had a ſuit depending in *Weſtminſter Hall*, whereon his all depended, and the term had been * adjourned, and he had preferred a petition with ſuch a clauſe therein, that the current of juſtice in his caſe had received an interruption: though the adjournment were good, convenient, and neceſſary, would this have been an offence? Beſides, theſe are not acts of the corporation; the common-council are but part of the corporation conſtituted to a * [275]

(*c*) 5 Co.
(*d*) 8 Co. 19.
(*e*) Jones 103.
(*f*) Prince's caſe, 8 Co. 28.
(*g*) Co. Lit. 527, 639.
(*h*) Year Book, 7 Rich. 2. No. 17.
(*i*) *Selden's Mare Clauſum*, 249.
(*k*) 8 Co.
(*l*) Title 169.
(*m*) Year Book 7 Hen. 6. pl. 1. 4 Inſt. 250. Jones 240. 5 Co. 63. 8 Co. 126.
(*n*) Dyer 577.

particular

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particular purpoſe; you cannot take notice of any other power they have, than what appears in the pleadings: they cannot forfeit any more than they can ſurrender, or grant; they are by cuſtom, not by charter; their power and authority reaches only to what their uſage hath been; and they have not uſed or accuſtomed to forfeit: I ſuppoſe they are founded upon ſome bye-law which is loſt; how therefore can we ſuppoſe they have any authority to forfeit and ruin the body? all their power is for the benefit and advancement of the principal. Laſtly, whether theſe acts ſhall forfeit a corporation? I think it as great a point as if MAGNA CHARTA were at ſtake: all the corporations in *England*, both eccleſiaſtical and civil, may then be forfeited; and three parts in five of the houſe of commons are citizens and burgeſſes, and conſequently one of the three eſtates of the realm, for the moſt part depends thereon. I ſhall endeavour to anſwer the reaſons they go on, and

THE FIRST reaſon is, that if it were otherwiſe, corporations might act extravagantly, and have no adequate puniſhment: I anſwer, there is no offence but the actors will be puniſhable in their private capacities, and if it were (as they would have it) then thoſe parts of the corporation which do not concur to the fact, muſt be puniſhed for another's fault; which would be contrary to all natural juſtice.

SECONDLY, they object, the general rule of law, that an abuſer of a franchiſe is a forfeiture thereof. I anſwer, that they ſhall by an abuſer thereof forfeit the particular franchiſe abuſed, and no other but what is dependant on, and incident to it (*o*). And if their rule were true, the *abbot of St. Alban's* ſhould have forfeited not only his gaol, but his very abbacy: I agree that the forfeiture of an incident may forfeit the principal: if a man miſuſe a pie-powder * court, or toll, he ſhall forfeit the very fair or market.

* [276]

THIRDLY, They object that a corporation is a franchiſe, and commences by grant, and is ſurrenderable and forfeitable as a franchiſe. I anſwer and agree, that a franchiſe is a large word and may include it; but this is like the privilege of being a natural perſon: I think that no true poſition, that what is grantable may be ſurrendered, and what may be ſurrendered is forfeitable; there is a vaſt difference between this and other franchiſes: franchiſes of other natures are eſtates and inheritances grantable and transferable over to others; they either carry ſome profit from the king or from the ſubject: in itſelf this is nothing but a perſonality and a meer capacity; this was never ſuch a franchiſe as they talk of (*p*). In all *the eyres* that ever have been, there is never a claim of a corporation, whereas all other franchiſes are, for their ſervices; as that of *Eaſter Term* in the ninth year of *Edward the Firſt, in the Exchequer Roll.* 25. *John Dennis* Mayor of *Sandwich*, and three others were impleaded, and judgment "*quod communitas de* SANDWICH *amittat libertatem* "*ſuam.*" 6 *Edw.* 2. *Rot. Clauſ. Memb.* 5. 4 *Inſt.* 228. Town of *Cambridge*, that and many more were cited, was in parliament: all theſe

(*o*) Bro. Abr. "*Franchiſe*" 34. 22 Aſſize 34. 9 Co. 96. 2 Inſt. 43.
(*p*) 2 Inſt. 278, 282.

precedents

precedents are above three hundred years old, except that of the ſecond year of *Richard the Second*, which was two hundred and ninety years ago, and never followed with any practice or authority ſince; they were very troubleſome times, and full of great commotions and diſorders, and therefore are not of ſuch weight: in all the books of the reports of thoſe times, there is nothing printed of thoſe ſeizures; which makes me think them rather illegal and diſorderly than fit precedents; and thoſe brought on MAGNA CHARTA, and all the other ſtatutes in affirmance of the liberty of the ſubject (*q*), to ſecure the people againſt the irregularities of thoſe times, ſeems their firſt care: and in all thoſe times when theſe ſeiſures were, the corporations ſtill were in being and not determined; did do corporate acts; and enjoyed their privilege ſtill, only *a cuſtos* inſtead of *a mayor*, and ſometimes a mayor of the king's appointment inſtead of the old one; *the cuſtos* took the oath of *mayor* and ſat * in court; a writ * [277] of right was brought, and they defended it, they made leaſes, they were ſued and did ſue, ſo that the corporations were not determined or diſſolved by thoſe ſeiſures; and all thoſe corporations which they ſay were ſo ſeiſed and forfeited, do plead themſelves corporations by preſcriptions, which cannot poſſibly be were it as they ſay, as *London* or *Briſtol*, *Glouceſter*, *Cambridge*, and *Sandwich*: is the corporation diſſolved *ipſo facto*, or only upon judgment? In the treaſurer's remembrancer's office in the exchequer, *baga de quo warranto in itinere North'ton* and *Bedford*, 4 *Edw.* 4. *Rot.* 2. A *quo warranto* againſt *William Bedford*, for hanging men for felonies committed out of the juriſdiction, the judgment was only, that their privilege of *infangthief* ſhould be ſeized with the offices of theſe that miſcarried themſelves in that matter. I ſhall not diſpute but that a ſeiſure and a forfeiture were all one and the ſame thing; whether it be ſurrenderable is not much to the purpoſe, and if they inſiſt on it they depend on a very doubtful argument, and therefore I ſhall not much diſpute it, only thus far it ſeems not; ſince thoſe that are members of a corporation do take an oath to preſerve the liberties of the corporations, and are members not only for themſelves, but are intruſted for others; and whatever they do contrary to their oath, and againſt the good of the corporation, is a forfeiture of their freemanſhip, and a cauſe of their diſfranchiſement, as is *James Baggs's caſe* (*r*) which ſtrongly argues that they cannot ſurrender it: the taking of a new charter of a market is a ſurrender of the old (*s*). But a corporation's taking of a new charter is no ſurrender of the former. A body politic is but a perſon created by law in reſemblance of a natural perſon, to have a capacity to ſue and be ſued, to take, to hold, and to enjoy to particular ends and purpoſes. *Co. Lit.* 11. 66. *Jones* 190. *F. N. B.* 12, 13. By a judgment againſt them, all debts owing to them will be gone, their lands will revert to the heirs of the donor, and ſo all the cuſtomary ſhares of a freeman's eſtate: all the acts of parliament relating to them will be as it were expired, for they relate only to the corporation. *Co. Lit.* 102.

(*q*) 1 Hen. 4. c. 5. the 4 Hen. 4. c. 1; the 7 Hen. 4. c. 1. the 3 Hen. 5. c. 1; the 2 Hen. 5. c. 1; the 2 Hen. 6. c. 1.

(*r*) 11 Co. 93.

(*s*) Year Book, 14 Hen. 6. pl. 12.

SAUNDERS

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* [278]

* SAUNDERS *Chief Juſtice.* If a corporation be not diſſolvable, then you ouſt the king of his *quo warranto*; and you likewiſe ſet up ſo many independent commonwealths as there are corporations in the kingdom.

Curia adviſare vult.

MR. ATTORNEY GENERAL in Trinity Term following, Tueſday June 12, prayed judgment for the king.

Then JONES *Juſtice* (the LORD SAUNDERS being ſick) ſaid, This caſe has been ſolemnly and elaborately argued on both ſides, and all ſaid that could be on either part: in the argument of this caſe there were many book-caſes, precedents, records, and authorities cited. All the book-caſes I have looked into and conſidered them; all the records and precedents I have ſeen, either atteſted copies, or the records themſelves; and ſeveral times have we met and had conferences about this matter, and we have waited on my LORD SAUNDERS during his ſickneſs often; and that very lately, and for my part I have had as mature and ſerious conſideration of this cauſe as poſſible, and I ſuppoſe my brothers have done ſo too; and upon deliberation we are all unanimouſly of opinion.

FIRST, As to the great preliminary point, whether a corporation aggregate, ſuch as the city of *London* is, may be forfeited or ſeized into the king's hands? we all think that it may upon a breach of the truſt repoſed in them for the good government of the king's people. As to a ſeizure it is plainly implied in the ſtatute of 28 *Edw.* 3. *c.* 10. which enacts, "That on the firſt offence the *city of London* ſhall forfeit a thouſand marks, on the ſecond two thouſand, and for the third, the liberty and franchiſe of the *city of London* ſhall be taken into the king's hands;" which plainly argues that there may be a ſeiſure of the corporation: and as to a forfeiture, the act of oblivion proves it, where, in 12 *Car.* 2. *c.* 11. *ſ.* 5. "All bodies corporate, cities, boroughs, &c. are pardoned and acquitted of all forfeitures, &c." and if the law ſhould be otherwiſe, it would erect ſo many independent republicks, as there are now corporations in *England*; which of how miſchievous conſequence it would be to the king and kingdom, every one may eaſily imagine.

* [279]

* SECONDLY. We are of opinion, that the aſſuming a power to make bye-laws for the levying of money, as they have done, is a great oppreſſion to the people, and conſequently a breach of the truſt repoſed in them for the welfare of the king's ſubjects, and conſequently a juſt cauſe of forfeiture.

THIRDLY, We are of opinion, that the petition mentioned in the pleading is ſo ſcandalous to the king and his government, and ſo tending to beget in the people a hatred of their ſovereign, that it is a juſt cauſe of forfeiture.

FOURTHLY, That theſe acts alledged are corporate acts, being ſufficiently alledged in the replication, and not ſufficiently anſwered in the rejoinder.

FIFTHLY,

FIFTHLY, That the excuſe mentioned in the rejoinder is frivolous and inſufficient.

LASTLY, That the information is well founded, and upon this whole record it is the judgment of this Court, and this Court does award, that the liberty and franchiſes of the city of *London* be ſeized into the king's hands.

RAYMOND *Juſtice.* To prevent ill ſurmiſes concerning this matter, I muſt declare that I am of the ſame opinion in all particulars.

WYTHENS *Juſtice.* I am ſo likewiſe; and this was the LORD SAUNDERS's opinion in all the ſeveral points.

Then MR. ATTORNEY GENERAL moved that judgment might not be entered up till the king's pleaſure be known concerning the ſame.

THE COURT. Let a rule be entered accordingly.

And in the long vacation following JUDGMENT was entered; and the lord mayor and aldermen conſtituted a-new by the king's commiſſion. (*t*)

(*t*) It is ſaid that this judgment was never recorded, 1 Bac. Abr. 509. *notis*; but it appears, S. C. 3 State Trials, 617. S. C. 6 State Trials, App. 16. that judgment was entered, "that the "liberty, privilege, and franchiſe of the "ſaid mayor, commonalty, and citizens, "of being a body politic and corpo-"rate, be ſeized into the king's hands "as forfeited" But ſee 3 Term Rep. 191.—King Charles the Second granted new charters, 3 Term Rep. 197. On the ſixth of October 1688, James the Second iſſued a proclamation, under the great ſeal, for reſtoring corporations to their ancient liberties, rights, and franchiſes, 3 Term Rep. 190, and in conſequence of this proclamation, the magiſtrates of the city of *London* were reſtored to their places according to the ancient conſtitution of the city, 6 State Trials 628. and by the ſtatute 2 Will. and Mary, ſeſſ. 1. c. 8. the above judgment and the proceedings thereupon are declared to be illegal and arbitrary, and are thereby reverſed, annulled, and made void to all intents and purpoſes, and the city reſtored to all rights, liberties, privileges, franchiſes, &c. which it had title or intereſt of, in, or to, at the time of giving the ſaid judgment: alſo, in *Sir James Smith's caſe*, it is reſolved, that the judgment to ſeize the liberties of the city did not diſſolve the corporation, or body politic, 1 Show. 240, 274. 4 Mod. 52. Carth. 217. Skin. 293, 310. 12 Mod. 17. But ſee Rex v. Amery, 2 Term Rep. 515; Newling v. Francis, 3 Term Rep. 189. and Mr. Kyd's Law of Corporations, ch. 5.

The King *againſt* Cane. Caſe 263.

KING'S BENCH, *Michaelmas Term*, 34 *Car.* 2. *Roll* 141. CROWN SIDE.

DEVON. *ſſ.* *MEMORANDUM quod ad generalem quarterialem ſeſſionem pacis domini regis tent. apud* CASTRUM EXON. *in et pro com.* DEVON. *præd. decimo die Januarii anno regni domini Caroli ſecundi Dei gratia Angliæ, * Scotiæ, Franciæ, et*

An indictment on 31 Eliz. c. 7 (*a*) for erecting a cottage without laying to it four acres of freehold land of inheritance, muſt ſhew that the land was not laid to it on the day the cottage is charged to have been erected.

* [280]

(*a*) Repealed by 15 Geo. 3. c. 32.

Hiberniæ

KING v. CANE.

Hiberniæ regis, fidei defenſoris, &c. triceſimo tertio coram JOHANNE BEAR A. B. C. D. E. F. *ac aliis ſociis ſuis juſticiariis dict. domini regis ad pacem in com. prædict. conſervand. necnon ad diverſ. felonias tranſgreſſiones et alia malefacta in eodem com. perpetrat. audiend. et terminand aſſignat. ſuper ſacr'um duodecim jurat. probor. et legalium homin. com. prædict. impanellat. jurat. et onerat. ad inquirend. pro dicto domino rege et corpore com. præd. præſentat. exiſtit quod* THOMAS CANE *jun. de* ASHBURTON *in com. prædict. lignar. primo die Decembris anno regni dict. domini regis triceſimo tertio vi et armis, &c. apud* ASHBURTON *præd. in com. prædict. apud quendam locum infra eandem parochiam communiter* VOCAT. The Cleaves *fecit erexit et edificavit, et fieri erigi et edificari cauſavit quoddam cottagium pro habitatione quod quidem cottagium eodem prim.o die Novembris anno ſupradict. non habuit nec adhuc habet quatuor acras terræ ad minus computand. ſecund. ſtatut. aut ordination. de terris menſurand. eidem cottagio aſſignat. cum eodem cottagio continue occupand. et manurand. tam diu quam idem cottagium inhabitat. fuit.* ET JURATORES *prædict. ulterius dicunt quod præfat.* THOMAS CANE *cottagium prædict. ſic per eum ut præfertur fact. edificat. et erect. aut fieri edificari et erigi cauſat. apud* ASHBURTON *præd. in com. prædict. vi et armis, &c. illicite et voluntarie ſuſtinuit manutenuit et continuavit a præd. primo die Decembris anno præd. per ſpacium unius menſis integri et amplius extunc proxime ſequent. in manifeſtum contempt. dict. domini regis, contra formam ſtatut. in hujuſmodi caſu edit. et proviſ. necnon contra pacem dict. domini regis nunc coron. et dignitat. ſuas, &c.*

On this indictment for the erecting and continuing of a cottage, I MOVED that it might be quaſhed for theſe exceptions:

FIRST. It is ſaid not to have four acres aſſigned to it the firſt of *November*, which is a month before the erection was; for that is laid to be the firſt of *December*, a month after; and for this it was quaſhed:

Other exceptions there were to it which were not moved. As,

SECONDLY. It is ſaid to be at a certain place *infra eandem parochiam*, and names no pariſh before.

THIRDLY. It does not ſay the erection was *contra formam ſtatut.* but only the continuance is ſo concluded to be.

* [281] * FOURTHLY. It does not ſay that the cottage was the defendant's, and perhaps he might be only a bricklayer or carpenter, and built it for another, and ſo not within this act of 31 *Eliz. c.* 7. againſt cottages and inmates.

FIFTHLY. It does not ſay that it was *pro habitatione hominum*; perhaps it is only a cow-houſe or dog-kennel, and ſo not within the ſtatute.

Sed quære of theſe exceptions.

Speake

Speake *againſt* Richards. Caſe 264.

AN ACTION held to lie againſt an *under ſheriff* for money levied on a *fieri facias*, as money received to the plaintiff's uſe; and that before the writ returned: and ſo ruled in this caſe; as likewiſe in a caſe of one *Verdon* of *Norfolk*.

An action lies againſt an *under ſheriff* for money levied under a *fieri facias*.

Abr. 410. S. C. Hob. 206. S. C. Hutton 11. S. C. 1 Brownl. 51. S. C. Moore 886. S. C. 2 Roll S. C. Noy. 22. S. C. Winch. Ent. 304. Ante 79.

Anonymous. Caſe 265.

IF three men bring an action, and the defendant puts in bail at the ſuit of four, they cannot declare againſt him; but if he had put in bail at the ſuit of one, that one might have declared againſt him. NOTA, *ſed quære.*

Bail, and declaration. S. C. 1 Mod. 5.

Caſe of vacating Fines in the Common Pleas. Caſe 266.

IN the Common Pleas they will ſet aſide a fine levied by an infant (during his life and infancy) upon motion, as null and void, and without any writ of error; as they will do a judgment irregularly obtained by trick or ſurpriſe, and puniſh the commiſſioners beſides, if it were taken by *dedimus*; and this they will do by inſpection and examination of witneſſes in court. But if he be affirmed to be of age, they will order a trial, by a feigned action, whether he were an infant or no? but then the complaint muſt be made to the Court before he comes of age, and then it matters not if after the motion: and ſo if, after * a writ of error, he arrives of age this will not prejudice him; for that an inſpection is at the firſt on the motion made, or the writ of error brought. So THE COURT did this term ſet aſide a fine levied by an infant, it being found by a jury that he was within age; as the LORD PEMBERTON told me.

In what caſes the court of Common Pleas will vacate A FINE on account of the *infancy* or *coverture* of the parties.

* [282]

2 Lev. 36. Cruiſe on Fines 302.

So if the next heir, or any relation come and inform the Court that the party was a *feme covert*, and levied a fine without her huſband, they will ſet it aſide as void.

In caſe a fine be taken by *dedimus*, before they allow the fine, they ſwear the commiſſioners whether it were the right party? and whether of age? and if a *feme covert*, whether duly examined?

Caſe 267. Anonymous.

In real actions there muſt be real ſummons.

IN real actions there ought to be real ſummoners, and two of them; and if there be not ſuch, though the ſheriff gave notice to the party, the Court will ſet aſide the judgment upon motion, without any writ of deceit; as was done in the caſe of *Searle v. Long.* (*a*)

1 Mod. 197. 2 Mod. 264. 1 Vent. 60. 1 Lev. 105. 1 Salk. 216.

(*a*) 1 Mod. 248.

Caſe 268. Anonymous.

In the Court of Chancery.

If a huſband ſue in Chancery for his wife's portion, the Court will oblige him to make an equitable ſettlement.

IF a huſband come to ſue in *Chancery* for his wife's portion, the Court, upon the prayer of the wife's friends and relations, will force him to ſecure the ſame, part for the wife, and part for the children; for ſay they, "*If you will have equity you muſt do equity*," and they may qualify their own decrees; but they will never force him if he come not there as complainant, as if he ſues at law, &c.

2 Atk. 67, 420. 1 Atk. 192. 2 Peer Wms. 639. 3 Peer Wms. 11. 1 Brown 269.

Caſe 269. Anonymous.

Alimony ſhall be ſued for in the ſpiritual courts, and not in chancery.

IN the late times they ſued for *alimony* in Chancery; and the judges were then of opinion, that there being no ſpiritual courts, nor civil law, the Chancery had the juriſdiction in thoſe days; but now * we have courts-chriſtian, the Chancery will allow of demurrers to ſuch bills for alimony. (*a*)

1 Ch. Rep. 44. 164. 187. 224. 2 Com. Dig. 132.

* [283]

(*a*) See Lit. 78. Ch. Rep. 44. 164. 187. 224. 2 Vern. 493. 2 Com. Dig. "Chancery" (2 D)

Caſe 270. Anonymous.

If a wife pawn her clothes, the huſband is not liable for *money* lent her to redeem them.

IF a wife pawn her clothes for money, and afterward borrow money to redeem them, the huſband is not chargeable unleſs he were conſenting, or unleſs the firſt ſum came to his uſe.

1 Roll. Abr. 350. Salk. 118. Prec. Chan. 502. 2 Lev. 16. 3 Wilſ. 388. 2 Com. Dig. "Baron and Feme." (2).

Anonymous. Caſe 271.

THIS was ruled by SAUNDERS *Chief Juſtice*, on evidence in a trial at GUILDHALL.

Freight is the mother of wages.

FIRST, Freight is the mother of wages, and whereſoever freight is due, wages is ſo.

SECONDLY, If a ſhip be loſt before it come to a delivering port, no freight nor wages is due; if loſt afterwards it is due to the laſt delivering port.

No freight due if the ſhip be loſt.

1 Sid. 236.
Dougl. 541. 523. 2 Burr. 882. 1 Bl. Rep. 190.

THIRDLY, Advance-money paid before, if in part of freight, and named ſo in the charter-party, although the ſhip be loſt before it come to a delivering port, yet wages are due according to the proportion of the freight paid before; for the freighters cannot have their money.

If a ſhip be loſt *wages* ſhall be paid in proportion to the money advanced for *freight*.

Memorandum.

THIS vacation SIR WILLIAM DOLBEN was put out, and SIR FRANCIS WYTHENS made Judge in his room, and the firſt day of Eaſter Term was made ſerjeant, and gave rings with this motto, *Regi lex placuit:* and I had the honour of delivering them to all the judges in court, and to all the great officers at court. The ſame day in the afternoon he was ſworn at the Lord Keeper's houſe, and two days after came into court; where I had the privilege of the motion without the bar, &c.

SIR FRANCIS WYTHENS promoted *vice* SIR W. DOLBEN.
Ray, 496.

* Eaſter Term;

The Thirty-fifth of Charles the Second,

IN

THE KING's BENCH.

Sir EDMOND SAUNDERS, *Knt. Chief Juſtice.*

Sir THOMAS JONES, *Knt.*
Sir THOMAS RAYMOND, *Knt.* } *Juſtices.*
Sir FRANCIS WYTHENS, *Knt.*

Sir ROBERT SAWYER, *Knt. Attorney General.*

HEANAGE FINCH, *Eſq. Solicitor General.*

Mew *againſt* Ruſſel.

Caſe 272.

ACTION upon the caſe on a warranty of goods ſold to be merchandizable, thus declares, *Quod cum* the plaintiff *barganiz.ſſet et emiſſet* of the defendant, ſo many hogſheads of claret-wine at ſuch a price, the defendant, *in conſideratione inde, warrantizabat et affirmabat, adtunc et ibidem, ea eſſe bona, &c.*

In an action on the caſe, a declaration ſtating "that the "plaintiff "bought ſuch "wines of the "defendant, and "the defendant, "in conſidera- "tion thereof, "then and "there war- "ranted them "to be mer- "chantable," is good, after verdict; for it ſhall be intended that *the warranty* and *the contract* were made at the ſame time.

MR. POLLEXFEN moved in arreſt of judgment, for that *the warranty* here is ſubſequent to *the contract*, and in conſideration of the contract, whereas it ought to be in the contract and parcel thereof; now this is but a voluntary promiſe afterwards. He cited the caſe of *Pape v. Lewin* (*a*), for that the defendant bargained to ſell to the plaintiff a mare, and that the defendant knowing her to be lame, ſold him the ſaid mare, and therein falſly deceived the ſaid plaintiff; and ruled that the declaration was not good, becauſe he does not ſay

(*a*) Cro. Jac. 630.

MEW v. RUSSEL.

warrantizando vendidit; for if the warranty was not at the time of the sale, the action is not maintainable; and here though it be said to be "*adtunc*," yet it plainly appears to be subsequent by the words "*in consideratione inde*."

SAUNDERS *Chief Justice*. The *adtunc* proves it to be all at the same time, and the exception is very nice: if it had been *postea*, perhaps it had been somewhat more dubious: * suppose the words "*in consideratione inde*" had been omitted; then it seems well enough: however, let it stay till it be moved on the other side.

* [285]

MR. HOLT, in Trinity Term following, moved for judgment, here being a general issue pleaded, and a verdict for the plaintiff: he agreed the warranty ought to be at the same time, or naught, and the usual form is *warrantizando vendidit*; but he said that it was all at one time here, for it is "*adtunc et ibidem*," which now after a verdict ought to be intended at the same time; and the money paid is always the consideration of the warranty.

And ALL THE COURT thought it well enough, and judgment was given for the plaintiff. *See Howlet's case*, *Latch.* 150.

Case 273. Jackson *against* Hall.

"Thou art a "pocky rascal," held not actionable.

CASE for words, "Thou art a pocky rascal," with an *innuendo*, "the *French* pox;" and an averment, that in common intendment the words are so understood.

1 Roll Abr. 43. 66.
1 Sid. 50.
Cro. Jac. 430.
Latch. 2.
1 Com. Dig. "Action for "Defamation," (D. 28.) (F. 19.)

HELD not actionable; otherwise if the averment had been of such intendment in a particular place, as *Welsh words*, and "healer of "felons" in the *west country*.

Judgment stayed.

Case 274. Taylor *against* Ames.

If *a son* die intestate in the life time of his father, and *the father* renounce, and administration be granted to *a brother* of the intestate, *qu.* whether his *sister* shall have distribution.

PROHIBITION was prayed to a libel in THE COURT-CHRISTIAN for distribution of an intestate's estate.

A. having two sons and a daughter, one of the sons dies intestate; the father renounces; the other son takes out letters of administration; the sister sues for a distribution.

Post, 407.
2 Bac. Abr. 429.
1 Com. Dig. "Administration," (H.)

IT WAS URGED for her, that she should have distribution, for that by the father's refusal it is as if there were no father in the case, and then the son and daughter are in equal line to the brother.

IT WAS ARGUED on the contrary, because the father is next of kin alone, and although on his refusal the right of administration shall

ſhall go to the next of kin after him, yet the right of diſtribution does not go beyond * the firſt next of kin in being at the inteſtate's death.

TAYLOR v. AMES.

* [286]

Adjournatur.

Caldicot *againſt* Smith. Caſe 275.

PROHIBITION was prayed to a ſuit in the ſpiritual court for a diſtribution, on that clauſe of the ſtatute 22 & 23 *Car.* 2. *c.* 10. which ſays, "That there ſhall be repreſentatives of collaterals "only to brothers and ſiſters children."

Diſtribution under 22 & 23 Car. 2. c. 10. ſhall only extend to brothers and ſiſters children of the inteſtate.

The queſtion was, Whether it ſhould be intended of brothers and ſiſters children of the party inteſtate, or of the adminiſtrator?

1 Salk. 250. 1 Ld. Ray. 571. 1 Peer Wms. 25. 2 Vern. 233. Prec. Ch. 28.

And IT WAS NOW HELD here, that it ſhould be only of the former; and *a prohibition* was accordingly granted.

Comy. Rep. 87. 4 Burn's Ecc. L. 370.

Rich *againſt* Player. Caſe 276.

MR. WILLIAMS now moved, in arreſt of judgment, on the exception on which the challenge was proved at the trial, that it is not good; for in *Auditor Curle's caſe*, 11 *Co.* it is reſolved, that they are but one officer, and if one of them die, the other can execute nothing till a new one be choſen; and he cited 31 *Aſſiſe*, *pl.* 20.

If one of the *ſheriffs of London* bring an action againſt THE CHAMBERLAIN, the fact may be ſurmiſed on THE ROLL, and the proceſs of *venire facias* directed to, and returned by, the *co-ſheriff*.

S. C. Ante, 262. S. C. Skin. 104. Skin. 105.

JEFFERYES *Serjeant è contra.* It is true, in *Middleſex* they are but one ſheriff, but in *London* they are two. The writs are "*vice-* "*comiti Midd.*" and "*tibi præcipimus*;" in *London* it is "*viceco-* "*mitib. et vobis*," which difference being always obſerved is certainly grounded on ſome reaſon; there are precedents expreſsly to the point. In *Norwich*, in Hilary Term, in the eighth year of *Henry the Eighth*, in the Common Pleas, *Rot.* 303. In *London*, in Trinity Term, the eighteenth of *Elizabeth*, in the Common Pleas, *Roll* 511. and in *Brownlowe's Brevia Judicial. fol.* 396. is the very ſame precedent with ours: there was the late caſe of ſheriff *Bethel v. Harvey*, where it was agreed good ſo: the caſe of coroners is agreed ſo in the books, that if one or three of them be challenged off, yet the fourth may execute the writ; and one coroner may do an act alone in the name of the whole, and ſet the names of the others thereto: as the coroners are a joint miniſterial officer, and in judicial acts ſeveral officers, ſo the ſheriffs are likewiſe, and they * have their ſeveral compters and courts.

* [287]

Adjournatur.

But afterwards judgment was given for the plaintiff.

Caſe 277. Ward *againſt* Lawrence.

A deputy to a clerk of THE CROWN OFFICE, *has no privilege of being ſued only in the King's Bench.*

THE DEFENDANT being arreſted upon a writ out of the Common Pleas, brings his *writ of privilege*, as clerk of THE CROWN OFFICE.

But he being only a clerk to *Mr. Philip Ward*, who is a clerk of the office, and not being himſelf an immediate clerk of the office, I MOVED the Court for *a ſuperſedeas* to the *writ of privilege*, and it was granted accordingly.

THE COURT agreeing him not to be privileged; as an attorney's clerk is not.

Caſe 278. The King *againſt* ſeveral Aldermen of Worceſter.

A freeman of a corporation may be a juror, although he has no freehold in the city.
S. C. Skin. 91.
S. C. 1 Vent. 366.
S. C. Raym. 484.
Cro. Eliz. 41c.

QUO WARRANTO againſt them, &c. Upon a trial at THE BAR the defendants challenged ſeveral jurors for not having forty pounds *per annum.*

And it was agreed by THE COURT, that a freeman in a corporation being of ſubſtance may be a juryman, though he have no freehold in the city: the practice always has been ſo, for otherwiſe there would be a failure of juſtice in many corporations, becauſe, in many of them, there are not freeholders enough to make a panel.

THE COURT ſent the *puiſne judge* to the Common Pleas to know their opinion herein, who agreed with this Court: and the challenge was accordingly over-ruled.

Caſe 279. The King *againſt* Smith, and others.

A bill of exceptions will not lie in the court of King's Bench on a trial at BAR. *Sed qu.*
Ante, caſe 127.
* [288]

RESOLVED *per Curiam* in this caſe, that a *bill of exceptions* lies not in this court upon a trial at THE BAR; for the words are, "he ſhall have remedy *coram domino rege*," which extends not to themſelves to over-rule their own judgment; and therefore extends only to *niſi prius* and inferior courts: it is true, in the caſe * of *Enfield v. Hill* (*a*), in this court on a trial at the bar, a *Canterbury* cauſe upon a *mandamus*, there was one ſealed, but at the trial there were only two judges preſent, RAINSFORD and JONES *Juſtices*, but JONES *Juſtice* doubted then, although if they determined the matter, then they could not proceed, he therefore did ſubmit to THE LORD CHIEF JUSTICE: and afterwards it was ſo ſtrongly doubted that they never proceeded to get any determination to this

(*a*) 2 Lev. 236. 2 Jones, 116. 3 Keb. 767. 859.

day

day (*b*). It ſeems to lie at *the ſeſſions* (*c*) or *ſheriff's court*, and being made part of the record, &c.

THE KING v. SMITH.

HELD LIKEWISE in this caſe, that if the ſheriff be indifferent and die, and another be made ſheriff who is challengeable, there may be a ſuggeſtion thereof upon THE ROLL, and ſo the writ directed to THE CORONER, and that although there were a writ regularly directed to the ſheriff at firſt, and a *non miſit breve*.

If a ſheriff die, and his ſucceſſor be challengeable, a ſuggeſtion may be entered, and the *venire* directed to the coroner.——Ante, 286.

If ſeveral perſons be defendants, and iſſue be joined as to ſeveral, and this goes to trial, if the ſheriff be a defendant, though not one of them that joined iſſue, yet the *venire* ought not to be to him.

The *venire* ought not to be to a defendant ſheriff, though he has not joined iſſue.

In this caſe the information was againſt ſeveral; ten of them plead to iſſue, and a *venire facias* to the ſheriff, and a *non miſit inde breve*; then the other defendants plead to iſſue, whereof the ſheriff is one; then a ſuggeſtion is made upon THE ROLL thereof, and thereupon a *venire* is awarded to the coroner: and held good, and that it ſhould be ſo; for if the ſheriff had returned the *venire*, it might have been challenged off at the trial.

If a ſheriff, being a co-defendant, return the *venire*, it is cauſe of challenge, though he did not plead until after the award of the writ.

And judgment was given upon this againſt them for the king.

(*b*) See the ſtatute Weſtminſter the Second, c. 31. 2 Inſt. 427.

(*c*) But ſee the caſe of Rex v. Preſton on the Hill, Burr. S. C. 77. and Mr. Conſt's edition of Bott's Poor Laws, vol. ii. p. 827. where it is determined after great deliberation, that a *bill of exceptions* will not lie at SESSIONS.

Machell *againſt* Sir William Temple. Caſe 280.

EJECTMENT. On a trial at the bar, there was given in evidence a deed of ſettlement, with power to revoke by any deed, ſealed and delivered in, &c. or by his laſt will and teſtament: the party makes his will, and publiſhes it in the preſence of three witneſſes (*a*), and he being ſick, and ſo great a company in the room, that the noiſe thereof diſturbed him, he deſires them to go into the next room to ſet their * names; which they did accordingly.

A will publiſhed in the preſence of three witneſſes, but ſubſcribed by them in an adjoining room, and out of the ſight of the teſtator, is void, by 29 Car. 2. c. 3.

Hereupon aroſe two queſtions, one of which was, Whether this were a good will within the ſtatute 29 *Car.* 2. *c.* 3. lately made againſt

* [289]

(*a*) It is not neceſſary that a teſtator ſhould *ſign* his will in the preſence of the witneſſes; it is ſufficient if he acknowledge the name to be his, Stonehouſe v. Evelyn, 3 Peer Wms. 253. Grayſon v Atkinſon, 2 Vezey, 454. Dormer v. Thurland, 2 Peer Wms. 510. Peat v. Ongley, Comy. Rep. 8vo. edit. 197. and this acknowledgment of the ſigning may be made to the witneſſes ſeparately, and at different times; for although they muſt all ſee the teſtator ſign, or hear him acknowledge the ſignature, yet it need not be in the preſence of each other, Cook v. Parſon, Prec. Chan. 185. Jones v. Lake, 2 Atk. 177. Bond v. Sewel, 3 Burr. 1773.

frauds

MACRELL v. SIR WILLIAM TEMPLE.

frauds and perjuries, that ſtatute requiring that the witneſſes ſhould ſign it in the preſence of the teſtator (*b*).

Whether a will was atteſted in the preſence of the teſtator, is a queſtion for the jury to try.

THE COURT and Council agreed on a ſpecial verdict, but the jury being obſtinate after twice or thrice ſent out, would find for the plaintiff, who was heir at law, although there was a doubt in the law, ſaying they were all of opinion it was no good will (*c*); and thereupon the poll was demanded, that they might all of them ſeverally give their verdict, which they all accordingly did for the plaintiff.

The jury may refuſe to find a ſpecial verdict.

NOTE, The firſt jury that ever refuſed a ſpecial verdict on a point in law, they all incurring the danger of an attaint. But ſee *Vaugh.* 145. 150. 152, 153.

(*b*) As to what ſhall be conſidered as a ſigning in the preſence of the teſtator, ſee Longford v. Eyre, 1 Peer Wms. 740. Shires v. Glaſſcock, 2 Salk. 688. Nicholas v. Smith, 3 Salk. 395. Caſſon v. Dade, 1 Brown Chan. Caſes, 99. Eccleſton v. Pally, Carth. 79. Broderick v. Broderick, 1 Peer Wms. 239.

(*c*) See the caſe of Hande v. James, that the queſtion whether the ſigning was in the preſence of the teſtator, or not, is a fact for the conſideration of the jury, under all the circumſtances of the caſe. Comy. Rep. 531. 2 Eq. Caſes Abr. 764; and the ſame point was determined in Croft v. Pawlet, 2 Stra. 1109.

Caſe 281. The King *againſt* Keller.

An indictment lies againſt *a maſter* for immoderately beating his apprentice.

1 Bott's P. L. 509.

INFORMATION againſt the defendant for immoderate beating one *Brothwaite*, who was his apprentice by indenture.

SAUNDERS *Chief Juſtice*, on the trial before him at *Guildhall*, held, that the juſtices of the peace might, by the 43 *Eliz. c.* 2., diſcharge an apprentice from his maſter, and *è contra*; and ſaid, that it was ſo reſolved by LORD HALE; and that the information lay.

And the defendant was convicted.

Caſe 282. The King *againſt* Duhammel.

The ſeſſions may diſcharge an apprentice from his indentures, on account of the default and ill treatment of the maſter.

S. C. Skin. 108. 2 Sand. 513. B. R. H. 101. Str. 1014. 1 Mod. 286.

MOTION to quaſh an order of ſeſſions made on the petition of *William Eaton*, an indenture-apprentice to the defendant, with whom there was given ten pounds, and a ſuit of clothes, for the diſcharge of the ſaid apprentice from his maſter and indentures, and for the return of the ten pounds (upon the account of immoderate beating and not providing neceſſary meat and drink) and for the delivery up of his * indenture to be cancelled, and of his wearing apparel.

* [290]

THE FIRST EXCEPTION taken was, that they had not power unleſs by the ſtatute 5 *Eliz. c.* 4. of labourers, and of apprentices bound out by the pariſh; but IT WAS RESOLVED that they had power by 43 *Eliz. c.* 2.

SECOND

SECOND EXCEPTION, That they had no power to order a return of the money: BUT IT WAS HELD that they had power to make an order concerning it, as an incident inſeparable to the other.

The ſeſſion, on diſcharging an apprentice, may order a return of the apprentice fee.

And the order was confirmed.

Stra. 69. Bott's P. L. 510.

The King *againſt* The Pariſh of Chiſtleton. Caſe 283.

KINGS BENCH, *Eaſter Term*, 35 *Car.* 2. *Roll* . CROWN SIDE.

Precedent of an order of ſeſſions for the removal and ſettlement of a pauper.

" WILTS, to wit. At a general ſeſſion of the peace of our " lord the king, holden at *Marlborough*, in and for the " county aforeſaid, on *Tueſday*, to wit, the third day of *October*, " in the thirty-fourth year of the reign of the Lord *Charles the Second*, " by the grace of God of *England*, *Scotland*, *France*, and *Ireland*, " king, Defender of the Faith, &c. before *Jacob Long*, Baronet, " *Gilbert Talbot*, Knight, *John Talbot*, Knight, and others their " fellows, juſtices of the ſaid lord the king, aſſigned to keep the peace " in the county aforeſaid, and alſo to hear and determine divers " felonies, treſpaſſes, and other miſdemeanors, committed in the ſame " county, &c.

" UPON COMPLAINT made unto this Court by the overſeers of " the poor, and other the inhabitants of the pariſh of *Wroughton*, in " this county, that *John Robbins*, a poor inhabitant of the pariſh of " *Chiſtleton*, in this ſame county, hath lately intruded himſelf with " his wife and family into the pariſh of *Wroughton*: this Court, " upon hearing of counſel and witneſſes, and what could be alledged " on either ſide, doth order and adjudge the ſaid *John Robbins* to " be a ſettled inhabitant of *Chiſtleton* aforeſaid; and the overſeers of " the poor of the ſame pariſh are hereby ordered to receive him the " ſaid *John Robbins*, with his family, into their ſaid pariſh of *Chiſ-* " *tleton*, and provide for them as their poor according to law; and " the inhabitants of the pariſh of *Wroughton* aforeſaid, are hereby " diſcharged of and from the ſaid *John* * *Robbins*, or his ſaid family, * [291] " or any thing relating thereunto."

I MOVED to quaſh this order.

Juſtices of the peace have power reſpecting the ſettlement of the poor, as incident to the authority given them by the 43 Eliz. c. 2.

FIRST, For that the juſtices of the peace have no power to make an order of this nature: the power of a juſtice of the peace is either by the *common law*, or by his *commiſſion*, or elſe by ſome *particular ſtatute*: it muſt be agreed that vagabonds, labourers, beggars, and baſtard-children, &c. are within their authority, and perhaps to

and therefore an order of removal made during the ſuſpenſion of the ſtatute 13 & 14 Car. 2. c. 2. was good.

adjudge

THE KING v. PARISH OF CRISTLETON.

adjudge their habitations, and order their removal to the place of their birth or former abode; but that is not our caſe. By the common law, and before the reign of *Queen Elizabeth*, there was no proviſion at all made for the poor's maintenance, unleſs in ſome particular cities and boroughs, as *London*, &c. where, by cuſtom, the major part were wont, by a kind of bye-law, to conclude the reſt into a rate; but the general ſuſtenance of the poor in ancient time, was by charitable and voluntary contributions of religious and other well-diſpoſed perſons; and for the moſt part they were appurtenances, or rather incumbrances, to the religious houſes, as the abbeys, monaſteries, and nunneries; and in our law books we find this reaſon given, why the revenue of the church ſhould be encouraged and ſupported, *viz.* for the maintenance of charity and hoſpitality: and for any thing I can obſerve, it was the ſole proviſion for the poor in thoſe days: nay, by the 12 *Rich.* 2. *c.* 6. it was enacted, "That "in every licence of appropriation of any pariſh church, it ſhould "be expreſsly contained, that the dioceſan of the place upon the "appropriation of ſuch churches, ſhould ordain a convenient ſum of "money to be paid yearly of the fruits and profits of the ſame "churches, by thoſe that would have the ſaid churches in proper "uſe, and by their ſucceſſors, to be diſtributed among the poor pa-"riſhioners of the ſaid pariſh, in aid of their living and ſuſtenance;" every word of which act is an argument that the poor were reckoned God's, and the church-men their overſeers; as if the law-makers feared, that when thoſe lands were got into laymen's poſſeſſions, charity would wax cold, they therefore made this proviſion: * now their commiſſion gives them no ſuch power in this reſpect, unleſs poverty be a crime, and to be hungry a breach of the peace. Juſtices of the peace were created by 1 *Edw.* 3. *c.* 15. but firſt named ſo by 36 *Edw.* 3. *c.* 12. and before, and at that time there were *conſervatores pacis* (and ſuch are all conſtables). Now *Dalton* tells us (*a*), That a juſtice of peace muſt proceed by the preſcript of his commiſſion and ſtatute law; and in truth he has no authority but by one of theſe two: not a word in their commiſſion inclines to give any ſuch power as this. Beſides, their very ſtile and denomination ſhews that their office is for another intent: it is true, there are ſeveral things within their juriſdiction which cannot properly be reckoned within their commiſſion, but then it is given by ſome particular ſtatute, for their office originally and properly is quite to another purpoſe, *viz.* the examination and puniſhment of offences; ſo that what power they had was not founded in the nature of their office, and then it is no more than a particular power given by ſtatute to *J. S.* which being temporary, is gone by the expiration of the time that act was to endure for. As for the ſtatute 13 & 14 Car. 2. *c.* 12. that being temporary and the time expired, their power is gone too (*b*): if we conſider the nature of a temporary act, it will appear

* [292]

(*a*) Dalton's Juſtice, 22.

(*b*) Continued by the 1 Jac. 2. c. 17; the 3 & 4 Will. and Mary, c. 11; the 4 & 5 Will. and Mary, c. 24; and made perpetual by the 12 Ann. ſt. 1. c. 18.

that

that there was no power before nor after ſuch act; its being temporary implies that it was a new proviſion; for I know not one temporary act of parliament that is in affirmance of the common law, but they are all introductive of a new law; and all thoſe acts that are in the book of law ſaid to be affirmative of the common law, are perpetual; for why do our law-makers make an act temporary? It is becauſe it being a new proviſion, or new remedy; therefore they make it to laſt but for a time, becauſe they know not what inconveniences may happen upon the change of the law, or introduction of a novelty; if the event be good they can continue it at pleaſure; if it prove inconvenient, it is but a little time and it will expire of courſe. And it is further obſervable, that all theſe temporary acts are to expire at the end of the ſeſſion * of parliament, and none of them expire at a day certain, or the firſt day of a ſeſſion of parliament: the reaſon ſeems palpable; becauſe if upon ſuch a time's experience, it appear good and convenient, they can continue it that ſeſſion, and that without any intermiſſion of time: now if this had been thought convenient it would have been continued; if it had been declaratory of an ancient power lodged in the juſtices of the peace, they would have made it perpetual and not temporary, in order to try by practice if convenient for the weal-public; ſo that it ſeems plain they had no ſuch power before the act, and they never uſed it before; for although upon the diſſolutions of abbeys and monaſteries, the number and clamours of the poor reached laymen's ears, and made 43 *Eliz. c.* 2. neceſſary, yet that gives no ſuch power, for it is a quite different thing to ſign rates, and to remove and change men's dwelling. In the caſe of the pariſh of *Kimmalton v. Layſtas* (*c*), in the county of *Hereford*, the juſtices of the peace at their ſeſſions ordered a man and his family from one pariſh to another, on the account of being a poor inhabitant, and ordered the place of his former abode to receive him; and there it was reſolved by WHITLOCK *Juſtice*, that they had no power to make ſuch an order, unleſs he had been impotent, and ſo within the 43 *Eliz. c.* 2. or actually chargeable to the pariſh, otherwiſe he might provide himſelf where he could get a houſe. At the ſummer aſſizes at *Cambridge*, 1692, HARVEY *Juſtice* reſolved, that the juſtices of the peace were not to meddle either with the removing or ſettling any poor inhabitants, but only of wandering rogues (*d*). No man is to be put out of the town where he dwells, nor to be ſent to the place of birth or laſt habitation, but a vagrant rogue (*e*); and *Dalton* tells us (*f*), that he who ſhall bring any poor to any town, which are burdenſome to the town, may be raiſed in his rates towards the relief of the poor of the ſaid pariſh; which argues they were not removeable.

* [293]

* But THE COURT were of opinion that by 43 *Eliz. c.* 2. they had power, for the ſettlement of inhabitants, as an incident to the

* [294]

(*c*) 2 Bulſt. 347.
(*d*) Dalton's Juſtice, 97. cap. 40.
(*e*) Lambard, 107. 207.
(*f*) Dalton's Juſtice, 95, cap. 40.

good

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good management of the powers of the ſaid act of 43 *Eliz. c.* 2. and although the 14 *Car.* 2. *c.* 12. does expire, yet the preſcription therein may remain as a directive to them to judge who ſhall be inhabitants.

THEN I took exceptions to the order itſelf.

An order of removal, although it do not ſay the pauper was *likely to be chargeable*, held good.

FIRST, It is not ſaid that he was likely to be chargeable to the pariſh; and this would have been an exception during the force of 13 & 14 *Car.* 2. *c.* 12.

But PER CURIAM, he is ſaid to he a poor inhabitant, and upon complaint of the pariſh, and they would never complain of a rich pariſhioner.

An order of removal, ſtating, "that he had "*lately* intruded," held good.

SECONDLY, They do not ſay that he was an inhabitant of *Wroughton*; it is, that he lately intruded himſelf; now this word *lately* has a very large retroſpect, and may be twenty years ſince, as we ſay *lately deceaſed* of one dead ten or twenty years.

An order of removal held good, without ſtating how long the pauper had been an inhabitant.

THIRDLY, They do not ſay how long he had been an inhabitant of *Chiſtleton*, or that there was any reaſon to make ſuch order.

THE COURT. This is a matter incident to their office upon 43 *Eliz. c.* 2. of which they are judges; and would not quaſh the order, but confirmed the ſame.

Caſe 284. Grey *againſt* Munford.

A wife may libel in the ſpiritual court for calling her huſband "A "CUCKOLD."

PROHIBITION prayed to a ſuit in THE COURT CHRISTIAN, for theſe words ſpoken to the defendant: "Thou art *a cuckold*;" for which *Munford*'s wife libels there, as an implicit calling of her *whore* and *adultreſs*, alledging *Munford* to have no other wife. And a prohibition was denied upon debate by THE WHOLE COURT.

Caſe 285. * Moore *againſt* Shutter.

* [295]

An action lies for a malicious proſecution by *information* as well as by *indictment*.

Ante, 144. 154. 46.

Poſt, 469.

CASE for a malicious proſecution of an *information* in MR. ASTREY's name, for ill words and a battery, and an acquittal by verdict (*a*).

After verdict for the plaintiff, it was moved in arreſt of judgment that the action lies not, becauſe it was not an *indictment* but an *information*.

AND IT WAS RULED that it does lie; and judgment was given for the plaintiff by THE WHOLE COURT.

(*a*) See 4 & 5 Will. & Mary, c. 18. 2 Hawk. P. C. ch. 26. ſ. 5.

Garret

Garret *againſt* Shelſon. Caſe 286.

CASE for words, "Thou art a pitiful idle raſcal, and not worth "a groat."

To ſay of *a trader* that he is not worth *a groat*, is actionable.

HELD actionable, being ſpoken of *a weaver*, and alledged that he got his living by *buying and ſelling*; becauſe the words amount to as much as calling a man "a bankrupt."

Ante, 153. N. Lut. 334. Strange, 762. Ld. Ray. 1480. 1 Com. Dig. 260.

And judgment for the plaintiff.—The caſe of *Drake v. Hill*, in *Sid.* 424, 425. is the ſame opinion.

Gourney *againſt* Fletcher. Caſe 287.

Trinity Term, 34 *Car.* 2. *B. R. Roll* 252.

ERROR on a judgment in *Ireland* in an action on the caſe, declaring *quod cum cepit, et vi et armis detinuit, quædam bona, &c. per quod perdidit venditionem.*

A declaration in caſe *quod cum*, the defendant took and detained goods, is bad.

HELD that the *quod cum* was naught, though *in caſe*, becauſe the dint of the action was the taking and detainer, and the *per quod* was only damage; and ſo there was no direct affirmation, and conſequently naught.

Ante, 27. Poſt, 447. 2 Lev. 206. 2 Salk. 636. 1 Sid. 187. 150. 2 Lutw. 1180. 2 Vent. 153. 2 Wilſ. 203. 1 Stra. 624.

And the judgment was reverſed.

* Vernon *againſt* Boverie. Caſe 288.

* [296]

ACTION on the caſe for money received to the plaintiff's uſe, and for wares ſold.

If *a factor* ſell the goods of his *principal*, and receive a draft from the *vendee* on his *banker* for the value of them, and accept from the banker *notes of hand* in diſcharge of ſuch draft, *the principal* cannot recover the value of the goods from the *vendee*, although *the banker* fail before the notes become due; for the *principal*, by receiving the notes from the *factor*, takes the *banker* for his debtor.

The caſe was this: the plaintiff having, by his factor, ſold goods to the defendant, the factor comes to the defendant for his money, who tells him that he would give him a note on his banker, (viz. the *Temples* who broke, which occaſioned the diſpute) and accordingly he writes a receipt in *Mr. Boverie*'s book of receipts, who tells him his man ſhould go with him, and he does go; and the bankers aſk him if he would have money or notes? he ſays he muſt pay it away, and thereupon takes two notes, payable to the perſons he was to pay it to, and receives of the banker ſeven ſhillings overplus, and within three hours after the banker breaks.

The queſtion was, whether the merchant were ſtill liable?

PEMBERTON

VERNON v. BOVERIE.

6 Mod. 36.
2 Ld. Ray. 923.
3 Burr. 1516.

PEMBERTON *Chief Juſtice* reſolved on the trial of this cauſe at *niſi prius*, all this matter being diſcloſed on evidence, that he was not liable. It was agreed, that if the banker had refuſed to pay him, the merchant had been chargeable ſtill, notwithſtanding the receipt given in the merchant's books; but here the plaintiff had accepted the banker for his debtor, by receiving part of the money, and taking notes in his friend's name; and ſo there was a negotiation of this matter, which diſcharged the merchant *Boverie*; and ſo the plaintiff became nonſuit.—SHOWER for the plaintiff.

Caſe 289. Cookſey *againſt* Boverie.

The holder of a *banker's draft* cannot recover againſt the *drawer* on non-payment by *the banker*, if he give the banker *credit* for it, or neglect to demand payment in due time.

INDEBITATUS ASSUMPSIT for wares ſold: the caſe was; that the plaintiff coming for his money, gave a receipt in the defendant's book, he ſaying, that at THE EXCHANGE he ſhould have his money, or a note from the defendant's bankers, the *Temples*: Accordingly *Boverie*'s man gets a note from the *Temples*, and on THE EXCHANGE delivers it to the plaintiff, who * goes to the *Temples* with this note, and they having a bill on the plaintiff for a ſmall ſum, that bill was delivered up, and ſo much money endorſed on the back of the bill as paid.

* [297]

PEMBERTON *Chief Juſtice* held, that in this caſe the merchant was not chargeable, the plaintiff having accepted the banker for his debtor, by diſcounting ſo much money: and the plaintiff in this caſe was likewiſe nonſuit, I being of counſel with the plaintiff.

NOTE, In both theſe caſes it is proved that the plaintiffs might have had their money of the banker, although really they never received the whole. The *Temples* breaking about one o'clock on *Shrove-Tueſday*.

Caſe 290. The King *againſt* Buckeridge.

A motion cannot be made in *arreſt of judgment*, or *mitigation of puniſhment*, on a conviction for a *miſdemeanor*, unleſs the defendant be preſent.

S. C. Skin. 159.

MRS. BUCKERIDGE being convicted of *forgery* on a trial here at the bar,

MAYNARD *Serjeant*, having *a diſpenſation*, came hither and offered exceptions in arreſt of judgment.

But was denied to be heard BY ALL THE COURT, unleſs his client were preſent.

THEN he urged, that as *amicus Curiæ*, he might inform them of an error in the proceedings, to prevent their giving a falſe judgment at any time; although he could not move in mitigation of the fine without his client's preſence.

But THE COURT ſaid, that the party ought to be preſent in both caſes.

The

The King *againſt* Hurſt. Caſe 291.

HURST, an attorney of *Canterbury*, was indicted on 23 *Eliz. c.* 1. for twenty pounds a month for not coming to church: he pleaded that he was *a proteſtant* and not *a papiſt*.

The 23 Eliz. c. 1. for not coming to church, extends to *proteſtants* as well as to *papiſts*; and the indictment may be found in *any* county. S. C. Skin. 99.

Ruled by THE COURT, on ſolemn debate, that theſe ſtatutes extend to all perſons of any perſuaſion whatſoever.

AND HELD good, though he were an inhabitant in *Canterbury* and the indictment in *Kent*, for that an indictment of ſuch a negative offence might be found any where in *England*.

* Harwood and his Wife *againſt* Manlove. Caſe 292.

In the Common Pleas. * [298]

THIS was an action on the caſe for an eſcape againſt the warden of THE FLEET.

It is not an eſcape for a priſoner in execution to go abroad by virtue of an *habeas corpus* out of chancery, called a *day-writ*, provided he is attended by a keeper. Ante, 17. Poſt, 298. 424. Nelſon's Lutw. 26. 182. 402. 1 Salk. 272. 273. 347. 4 Com. Dig. "Eſcape," (D.)

Upon evidence before LORD PEMBERTON, it appeared that the debtor had from the Lord Keeper a *habeas corpus*, (which they call *a day-writ*) returnable three or four days after its *teſte*, and that though the party were in *execution* upon a judgment in the Common Pleas, and that by virtue of that writ the party went out to the wine-licence-office, and not to any inns of court or chancery, nor was he ever carried to the Lord Keeper's at all, and this was in vacation-time,

PEMBERTON *Chief Juſtice* reſolved, that this *day-writ* is a *habeas corpus* out of *chancery*, which they may ſend at any time in *vacation* as well as in *term*; and ſo by virtue of the king's writ, the party was brought out of the priſon-houſe, and well, that is juſtifiable; then all that day ſo long as there was a keeper with him he was in cuſtody ſtill, and being returned at night to the priſon-houſe it is well enough. It is not an eſcape though he was not at the Lord Keeper's; that is not to us; let the chancery examine the contempt in not obeying the writ, by bringing the priſoner's body to their court.

And thereupon his directions to the jury were, that all that day he was under the cuſtody of *a baſton* or keeper.

And it being ſo left to the jury, they found for the defendant, with whom I was of counſel.

Caſe 293. Cooling *againſt* Glover.

Records altered on death of the Chief Juſtice.

ACTION upon the caſe for an eſcape permitted of the *Lord Purbeck*, ALIAS *Villers*.

It was tried, before RAYMOND and WYTHENS *Juſtices*, at *Weſtminſter*.

SAUNDERS *Chief Juſtice* being ſick, and afterwards dying this ſame term, the records were altered and made "*niſi prius* RAYMOND *et* "WYTHENS *venerint*," and ſealed a-new.

If a priſoner in execution go abroad, under colour of a *day-rule*, and without a keeper, it is an eſcape.
3 Co. 44
1 Ch. Rep. 67.
Moor. 299.
Stiles, 117.
Dyer, 275.
3 Com. Dig. "Eſcape," (D.)

* THE EVIDENCE in this cauſe was, that *Lord Purbeck* ſuch a day being in execution at the plaintiff's ſuit, did, on the tenth of *February*, eſcape, and was abroad at the play-houſe, and at *Kenſington*, and it happened, that that day was in *term time*, and there was *a day-rule* for his coming abroad, and that he returned at night as uſual.

* [299]

IT WAS HELD by thoſe two judges that this was an eſcape, for the *day-rule* is only *quod mareſc. ducat ad barram*; and though now they go about town any where, yet the end of it originally was only for their coming to *Weſtminſter* about their proper buſineſs, and not to go any where; then by favour it was allowed they might go to any *inn of court* or *chancery*, to ſpeak with counſel and attorney about their concerns and ſuits; but the letting them go abroad for their pleaſure under colour of this *day rule* would be an eſcape.

Juſtors are judges of the credibility of the witneſſes, as well as of the truth of the facts ſworn.

However, upon the credibility of the witneſſes, it was left to the jury, whether *Lord Purbeck* was at *Kenſington* that day.

And the jury found for the defendant, conſidering the hardſhip on the defendant *Glover*, of 1,123*l.* debt; whereas *Purbeck* being that night, and yet in cuſtody, and the principal witneſs, *viz.* the hackney coachman who pretended that he carried *Lord Purbeck* to *Kenſington*, having been kept up cloſe in THE SAVOY by *Cooling* for five days to make a witneſs of him.

Verdict for the defendant *Glover*, with whom I was of counſel.

Caſe 294. Lampen *againſt* Sir Edward Deering, and others.

The commiſſioners of THE TREASURY have the privilege of being ſued only in the Exchequer.

LATITAT is ſued out of this Court againſt the defendants, being commiſſioners of THE TREASURY.

SIR JOHN MAY, *puiſne baron* of the Exchequer, thereupon came into this Court, and ſhewed THE RED BOOK, which is an ancient book, and reckoned a record in their court, wherein it is ſaid

the treaſurer ſhall have the privilege of being ſued only in that court. LAMPEN v. SIR EDWARD DERING.

And on motion it was read, and the patent produced in court under THE GREAT SEAL OF ENGLAND, which conſtitutes the defendants, &c. and grants them the office of treaſurer of *England*; and thereon they demanded their privilege might be allowed.

* And, after ſome debate, it was granted; THE COURT grounding it on a record then before them. * [300]

MR. POLLEXFEN urged that there ought to have been a *writ of privilege* brought, and the ſheriff would have returned ſomewhat of it, &c. But THE COURT ſaid there was a record before them to judge upon.

And accordingly it was allowed.

Verdon *againſt* Deaele, and others. Caſe 295.

Hilary Term, 33 & 34 *Car.* 2. *Roll* 487.

TRESPASS for falſe impriſonment. The defendants juſtified by virtue of a warrant from the Houſe of Commons: the plaintiff replied, that, at the time of the taking, the parliament was prorogued: the defendants rejoined and ſay, they had no notice. The plaintiff ſays they had notice. And thereon iſſue is joined; and a trial had at the bar.

On an iſſue, whether defendants who are charged with the execution of the ſpeaker's warrant, had *notice* of the prorogation, evidence that they were told ſo by perſons of credit, is ſufficient. S. C. Poſt, 303. S. C. 2 Jones, 208. S. C. Bro. Ent. 129.

RESOLVED *per Curiam*, That whereſoever no man is bound to give notice, every man is bound to take notice (*a*), but yet reaſonable time for notice is required, nor are any perſons required to take notice where it is impoſſible to do ſo.

But on the evidence here it appeared, that for three or four of the ſix days the defendants were told all along the road, that the parliament was prorogued by perſons of good credit.

And the jury gave four hundred and ſixty pounds damages for the plaintiff.

(*a*) 1 Mod. 87. 300.

Weld *againſt* Chamberlaine. Caſe 296.

ON a trial before PEMBERTON *Chief Juſtice*, on an iſſue of "marriage or no marriage;" the evidence appeared to be this, that a man having taken orders according to the church of *England* in former times, and ejected in 1663, did contract them in theſe words: "I *A. B.* take thee *B. C.* for my eſpouſed, betrothed,

Previous to the 26 Geo. 2. c. 33 words of contract *de preſenti* repeated by a man and woman after a perſon, made a valid marriage, though no RING was uſed.

WELD v. CHAMBERLAINE. * [301]

" wedded wife, and will be thy eſpouſed, betrothed, and wedded " huſband until death:" the parſon ſpeaking theſe words, the man repeating them after him, and the * woman the like *mutatis mutandis*, and no *ring* according to the common-prayer book: but a cohabitation as man and wife for ten years afterwards.

PEMBERTON *Chief Juſtice* inclined to think it a good marriage, there being words of contract *de præſenti* repeated after a parſon in orders: but upon the importunity of counſel a caſe was to be made thereof (*a*).

(*a*) See the Marriage Act, 26 Geo. 2. c. 33. ſ. 13.

Caſe 297. Hartup *againſt* Wardlove.

Indebitatus aſſumpſit, will not lie to recover money depoſited for a ſpecial purpoſe, if the money has been laid out.
Cro. Eliz. 644.
1 Roll Rep. 259.
Owen, 86.
Hob. 209.

ON a trial: HELD by JONES *Juſtice*, that an *indebitatus aſſumpſit* lies not againſt a man where he has received money of the plaintiff to lay out to a particular uſe, and he has laid out part thereof accordingly; for then he ought to be called to *account* for the ſame by *action of account*; but if none were laid out, there an *indebitatus aſſumpſit* lies to recover back the money again; ſo if it were expended to another purpoſe, for there the ſum is certain, and may be demanded as a debt (*a*).

This was at *Guildhall* in my LORD SAUNDERS's abſence by ſickneſs.

(*a*) See the caſe of Poulter v. Cornwall, Salk. 9.

Trinity

* Trinity Term, *[302]

The Thirty-fifth of Charles the Second,

IN

THE KING's BENCH.

Sir EDMOND SAUNDERS, *Knt. Chief Juſtice.*

Sir THOMAS JONES, *Knt.*
Sir THOMAS RAYMOND, *Knt.*
Sir FRANCIS WYTHENS, *Knt.* } *Juſtices.*

Sir ROBERT SAWYER, *Knt. Attorney General.*

HEANAGE FINCH, *Eſq. Solicitor General.*

Traheere, qui tam, &c. *againſt* Pearce. Caſe 298.

DEBT for the penalty for foreſtalling a market, reciting the act of 5 & 6 of *Edw.* 6. *c.* 14. which was temporary, and then made perpetual by 13 *Eliz. c.* 25. in theſe words, "An act "made the *twenty-third January*;" whereas in truth it was the *thirtieth* of *January*, and THE ROLL being the *thirtieth*,

An expired ſtatute ſhall be revived, if clearly identified, although *the commencement* be miſrecited in the reviving ſtatute. 4 Term. Rep. 109.

The queſtion was, whether it ſhould be revived, being ſo miſnamed in the act of reviver?

In *Raſtal* it is ſaid to be the *twenty-fourth* of *January*; in *Keble* it is ſaid to be the *twenty-third*; whereas THE ROLL ſays the *thirtieth*; and the act of 13 *Eliz.* recites and revives it as made the *twenty-third* of *January*.

JONES, RAYMOND, and WYTHENS, *Juſtices*, (SAUNDERS *Chief Juſtice*, being ſick) held that it was revived, the title being right, and it being a beneficial law, and no other law againſt *regrators* and

TRAHERNE v. PEARCE.

foreſtallers but that; and the intent of the law-makers being to revive it, they would not conſtrue it void (*a*).

(*a*) But by 12 Geo. 3. c. 71. the ſtatute 5 & 6 Edw. 6. c. 14. is repealed.

Caſe 299. Sands *againſt* Exton.

Suggeſtion amendable.

SUGGESTION for a prohibition was in this cauſe allowed to be amended, and then moved again.

If a ſuggeſtion be founded on A CHARTER, a *profert* is not neceſſary. S. C. Raym. 488. S. C. Skin. 91.

Whereon it appeared, that at the inſtance of the king's advocate in the admiralty (upon a warrant * of the king and council for the purpoſe) there was an order to ſtay the plaintiff's ſhip till they gave caution, not to go to ſuch and ſuch places as are mentioned in the *Eaſt India* company's charter, they being infidel countries.

* [303]

And it was held BY THE COURT, that a *profert hic in Curia* is not neceſſary in a *ſuggeſtion*.

The KING'S BENCH will not prohibit *the admiralty* from proceeding on an *order of council*.

And it was RULED alſo, that there being no libel or ſuit in the admiralty, there lay no prohibition; for it was no point of juriſdiction: if they ſtop a ſhip by order and illegally, an action lies; and what they had done is not in execution of any ſentence, for there is no ſuit depending; it was only in purſuance of the king's warrant.

A PROHIBITION was denied: *tamen quære*; for in caſe of a probate of a will, or granting letters of adminiſtration, many times there is no ſuit depending, no libel, or citation.

Caſe 300. The Duke of Buckingham *againſt* Outlaw.

The Court will not change *the venue* in *ſcir. mag.* on the common affidavit.

Ante, 50. 197.

SCANDAL. MAGNAT. Motion to change the *venue* upon the common affidavit.

Doubted PER CURIAM. It has been done on account of intereſt and unindifferency in a county, but not on the common affidavit.

Adjournatur.

Caſe 301. Verdon *againſt* Deacle, and others.

The Court will order reſtitution of money levied on *fi. fa.* if execution be ſued out after *writ of error* allowed.

THE plaintiff having got a verdict and judgment as afore (*a*), a *writ of error* was brought and allowed, and bail put in, and notice thereof to the plaintiff; however, he took out execution on his judgment, and levied money, &c.

——S. C. Ante, 300. S. C. Bro. Ent. 129. Ante, 182.

(*a*) Ante, page 300. caſe 302.

Now

Now motion was made to the Court for reſtitution.

VERDON v. DEALLE.

It was held PER CURIAM, That the writ of error is well enough brought, being a writ of error in an action of treſpaſs, aſſault, &c. Impriſonment, though the action was only of treſpaſs and aſſault, becauſe the plaintiff had alledged in the body of his declaration an impriſonment.

AND THAT it was well enough, though the defendants themſelves had not given any *recognizance* but only *bail*; for though the 16 & 17 * *Car.* 2. *c.* 8. *ſ.* 3. be, "that no writ of error or *ſuperſedeas* "thereon, ſhall be a ſtay of proceedings, unleſs *bail* be put in ac- "cording to the ſtatute of *King James*, (*a*)" (which is, "that the "party ſhall put in *recognizance* with ſufficient ſureties") the practice being always only to put in bail.

A writ of error is a *ſuperſeaeas*, although only *bail*, and not *recognizance*, be put in. Carth. 221. 3 Lev. 275.

And RAYMOND *Juſtice*, ſaid it had been ſo ſettled in this Court upon debate: but it ſeems by the practiſers, that the defendant himſelf ought to give recognizance in caſe of an *ejectione firmæ* (*b*).

In the principal caſe reſtitution was awarded,

(*a*) 3 Jac. 1. c. 8.
(*b*) See Hayman v. Chope, poſt, 309. and 4 Burr. 2501.

The King *againſt* Bynon. Caſe 302.

INDICTMENT, for that the defendant being returned, &c. ſworn one of THE GRAND JURY for the county of ———, did make *a preſentment* without the aſſent of his fellows, and delivered it, among other preſentments, in form thus, "WE preſent, &c."— HELD to be an offence, although it is not ſaid "in the name of his "fellows:" and denied to be quaſhed upon that exception.

A grand juror is indictable for making a *preſentment* without aſſent of his fellows.

Howard *againſt* Richardſon. Caſe 303.

Eaſter Term, 34 & 35 *Car.* 2. *Roll.* 529, 530.

ERROR on a judgment in the Common Pleas; common error aſſigned.

A variance between an *original writ* and *the declaration*, in ſtating the value of the property, is aided by the ſtatutes of jeofails.

MR. POLLEXFEN *ore tenus* aſſigns for error *a variance* between *the original* recited and the declaration; *viz.* in the original property *ten ſhillings*, in the declaration property *fifteen ſhillings*; and ſo a difference in the value; which is naught.

MR. HOLT. That ought to have been aſſigned for error upon record, and then we might have had a *certiorari*.

Co. Lit. 303. a 2 Vent. 153. 2 Will. 85. 395.

MR. POLLEXFEN. That cannot be. It is true that if an error had been aſſigned in any part of the proceedings not recited, *diminution* might be alledged, and thereupon a *certiorari* ſhould go; but

HOWARD v. RICHARDSON.

Vide 6 Mod. 264. 269, 270, &c.

here you are concluded, for you have recited it so and so, which is wrong. Indeed the want of an *original* is helped by the statute, but a naughty one is not helped by any of the *statutes of Jeofails*, except it be matter of form, * which reaches only to a fault committed by the clerk, in a matter which his client could not inform him in; but this is a thing which the clerk could not know but by the party's information, *viz.* the value of the goods.

* [305]

THE COURT. This is a matter purely of form, and want of form is helped by the statute after verdict: now that it is only *form* and is not *substance*, appears plainly, because it is no way material to the purpose, and the same might have been omitted, it being case.

Judgment affirmed unless better cause, &c.

Case 304. Knightley *against* Marrow.

Trinity Term, 34 *Car.* 2. *Roll.* 472.

To say of a justice of the peace, deputy-lieutenant, and candidate for a seat in parliament, that "*A priest gave him the eucharist, and that being sick he received from him extreme unction*," is actionable.

S. C. 3 Lev. 68. Ray. 482. Ante, 140 250. 3 Mod. 26. Cro. Eliz. 396. 433. S. K. 694. 10 Mod. 195. Ld. Ray. 1369. 2 Bl. Rep. 730.

ERROR on a judgment in the court of Common Pleas, in an action on the case for words, "A priest gave him *the eucharist*, "and being sick he received from him *extreme unction*," and by *innuendos* applying it to the popish usage; and lays him to be *a justice of peace*, and *deputy-lieutenant* of the county, and at that time standing for election of *knight of the shire* to serve in parliament.

MR. POLLEXFEN *for the plaintiff in the writ of error.*—The word "priest" cannot with an *innuendo* be intended "popish priest;" for in itself it intends and means a priest according to THE CHURCH OF ENGLAND; for in our statutes, and in our liturgy and books of consecration of bishops, priests, and deacons, &c. And "The eucharist" signifies the sacrament of the Lord's supper; and for "extreme unction" it is not prohibited: it is said in THE THIRTY-NINE ARTICLES of our church, to be a sacramental, but no sacrament; and there are two places of scripture from which weak men may be induced to think it lawful: our church no where censures it, but only denies it to be a sacrament. Then supposing it to be an ill thing, yet that will not make it actionable; "a papist" signifies one that holds the pope's supremacy, and denies the king's, and therefore actionable: no words about religion were actionable, till certain laws inflicted penalties on certain opinions; nor now can they be actionable * any further than the penalties reach the matter or crime charged in the words, *Sir John Tasborough's case*, 2 *Roll. Rep.* 43. 1 *Roll. Abr.* 56. the same case.

* [306]

MR. WILLIAM FINCH. These words do sufficiently describe "a papist," and a bye-stander would understand by the same nothing else. Suppose a man were indicted for being a priest, this would be full evidence to convict him; and, upon proof of his officiating as a priest, his taking orders shall be presumed.

IT

IT WAS AGREED by all, that if ſeveral words are laid to be ſpoken at one time, and ſome of them are actionable, and others not ſo, though entire damages be given, yet it ſhall be well enough, for they ſhall be intended to be given for thoſe words that are actionable; but if the words are laid to be ſpoken at ſeveral times, though all in one day, as that ſuch a day, year, and place he ſaid thus: —*Et poſtea ſcilicet eiſdem die anno et loco* he ſaid—and entire damages are given, if any of the words be not actionable, it is naught.

Entire damages are good on ſeveral words laid as ſpoken on th ſame day, but not if laid on different days.

Poſt, 313. 10 Co. 130. 1 Roll. Abr. 576. Cro. Eliz. 329. 787. Cro. Car. 328.

But as to the principal caſe, *Adjournatur* (*a*).

1 Lev. 134. Dougl. 377. 730. 3 Term Rep. 433.

(*a*) The declaration ſtated two ſets of words as ſpoken on different days: FIRST, "A prieſt," *innuendo* a popiſh prieſt "gave "the euchariſt and extreme unction to *Sir* "*John Knightley*." SECONDLY, "I ſaw "a popiſh prieſt anoint him," *innuendo* extreme unction, "and give him the ſacra-"ment of the euchariſt;" and on a motion in arreſt of judgment, the Court reſolved that the words altogether are actionable; for that one part explained the meaning and the ſcandal of the other: for the firſt words, "a prieſt gave him the "euchariſt," muſt mean, "a popiſh "prieſt," and he to whom it was given muſt be *a papiſt*; becauſe popiſh prieſts never give their ſacraments to any that are not complete and perfect papiſts; and that the laſt words "anoint him," being ſpoken of one that was ſick, and applied by a popiſh prieſt, cannot be intended any thing elſe but "*extreme unction*;" and judgment was given for the plaintiff. S. C. 3 Lev. 69. But it does not appear that any judgment was given on the writ of error. It has, however, been determined, that to call a juſtice of peace, Iriſh privy counſellor, deputy-lieutenant, and member of parliament, *a papiſt*, is actionable. Roe v. Sir T. Clarges, 3 Mod. 26. Ante, 250. Sir John Cutler v. Friend, 2 Show. 140. How v. Prinne, 2 Ld. Ray. 812. S. C. 2 Mod. 107. S. C. 1 Vin. Abr. 442. S. C. 1 Brown's Caſes Parl. 97.

Pepys *againſt* Wyne. Caſe 305.

Hilary Term, 34 & 35 *Car.* 2. *Roll.* 229.

CASE for ſcandalous words, laid to be ſpoken the *twenty-eighth* of *January laſt*, and the declaration is of *Hilary Term* generally, without any *ſpecial memorandum* of the time of filing the declaration.

In an action for words laid to have been ſpoken on 28*th January laſt*, a declaration entitled of *Hilary Term* generally, without any *ſpecial memorandum*, is good.

2 Lev. 176. 4 Mod. 367. 1 Vent. 135. 1 Sid. 432. Stra. 1271. Cowp. 455. 1 Wilſ. 171. 1 Com. Dig. "Action," (E.)

MR. THOMPSON *in arreſt of judgment*. It appears by the record that they had no cauſe of action at the time of the commencement of the action, the declaration being generally of *Hilary Term*, which is the firſt day of the term.

QUÆRE; *Cur' dubitavit.*

Some ſay a *ſpecial memorandum* ought to be made thereof as to the time, others ſay not: ſome ſay the action commences from the filing of the bail in caſe it be *by bill*, but in caſe of *original* it is to be accounted from the day of ſuing it, which is a particular certain day; but bail is now filed generally of ſuch a term, and no day ſpecified as formerly.

* MR. HOLT, in *Michaelmas Term* following, moved it again, that the proceedings here is by way of *bill*, and no ſpecial entry of the

* [307]

PEPYS v. WYNE.

the filing of the bill, it must then be before the cause of action commenced, for that it shall be intended to be a bill of the first day of the term.

MR. BONYTHON. It is well enough, and so was it ruled in the case of *Manne v. Adam* (*a*); in *Proger's case* (*b*); in the case of *Bateman v. Porter* (*c*), in LORD SAUNDERS's time; and in *Dobson v. Bell* (*d*); and it has been ruled good, both on evidence, and on motions in arrest of judgment.

But MR. HOLT urged it could not be good without a special entry as to the day in *the memorandum*, and cited the case of *Hutchinson qui tam, v. Thomas* (*e*). An information of that term generally; the defendant pleads, that before the exhibiting of that information there was another exhibited, *viz.*, the twenty-third of *October*, and held an ill plea.

WYTHENS *Justice*, held it ill in the principal case.

But JEFFERYES *Chief Justice*, and the two other judges held it well enough.

And accordingly judgment was given for the plaintiff.

(*a*) 1 Sid. 432.
(*b*) 1 Sid. 432.
(*c*)
(*d*) Trinity Term, 28 Car. 2. 2 Lev. 176. 3 Keb. 693. 2 Jones 87.
(*e*) In Trinity term, 27 Car. 2. entered in the King's Bench in Michaelmas term, 26 Car. 2. Roll. 1591. Reported 3 Keble, 426.

Case 306. Copleſtone *againſt* Copleſtone.

The father ſhall have adminiſtration of his ſon's goods, in preference to his ſiſter.

MANDAMUS was prayed by MR. WALLOP to the eccleſiaſtical court, to grant letters of adminiſtration to *Sir John Copleſtone*, of the goods of his ſon *Pawlet Copleſtone*, his ſiſter ſuing there for it: and granted PER CURIAM, for the father ſhall be adminiſtrator to his ſon before the ſiſter.

3 Co. 40. Prec. Ch. 527. 1 Salk. 38. 251. 2 Vern. 125.

Case 307. Eaton *againſt* Sherwin.

An *aſſumpſit* lies on a promiſe to pay ſo much in conſideration of taking tithes.

CASE upon a ſpecial promiſe for *tithes* for ſix years.

On a motion in arreſt of judgment IT WAS HELD good, though ſuch an agreement be not a good leaſe, nor does any intereſt paſs by the ſame in the tithes (*a*); yet it is good to ground an *aſſumpſit*, and the action lies.

S. C. Skin. 113. Hob. 176. Cro. Jac. 137. Yelv. 131. Cro. Eliz. 245.

Judgment for the plaintiff.

(*a*) But now by 5 Geo. 3. c. 17. all leaſes for one, two, or three lives, or any term not exceeding twenty-one years, of any tithes, &c. made by any perſons enabled by the ſeveral ſtatutes to make leaſes for one, two, or three lives, or term not exceeding twenty-one years, are declared to be good and legal againſt the perſons granting the ſame, and their ſucceſſors.

Croſſe

* Croſſe *againſt* Lenthall.

Caſe 308.

* [308]

ACTION againſt the defendant, as ſuperior, and having the inheritance of the office of MARSHAL, for an eſcape ſuffered by *Cooling* the late MARSHAL, he being inſolvent.

The marſhal of the King's Bench, while the office was held by inheritance, was not liable for eſcape ſuffered by his deputy.

MR. MEDLICOT moved, that the defendant being under the controul of this Court, having an office here, might bring his deeds into court to ſhew his title.

But denied PER CURIAM. For in caſe of a vacancy, and a new marſhal be offered to be ſworn by a grant from any perſon, we demand to ſee his title, that a wrong officer may not be ſworn; and then the grant is inrolled; ſo that it appears by that record who has the inheritance; and you know that: but there is no reaſon why we ſhould force him to ſhew his title only to ſubject himſelf to an action; and you know, that if any one have an eſtate for life in the office, he who has the inheritance is not chargeable; the ſuperior then ſhall not anſwer for the ſame.—Take your courſe (*a*).

1 Roll Abr. 812.

(*a*) By 8 & 9 Will. 3. c. 27. the perſons to whom the inheritance of the King's Bench and Fleet priſon belonged, were made anſwerable for all forfeitures, eſcapes, and miſdemeanors permitted, ſuffered, or committed by their reſpective deputies: but by 27 Geo. 2. c. 17. the priſon houſe, with the power of appointing a marſhal of the King's Bench during good behaviour, and while he ſhall be reſident in the priſon, or the rules thereof, is veſted in the crown; and the appointment of inferior officers given to the marſhal.

Straker *againſt* Baynes.

Caſe 309.

PROHIBITION was prayed, and a rule for it *niſi*, &c. and all things to ſtay in the interim: and the rule made abſolute for a prohibition the laſt Hilary Term, and a prohibition then went.

The ſix months required by 2 Edw. 6. c. 13. for proving the *ſuggeſtion*, ſhall be reckoned from the iſſuing of *the prohibition*.

RESOLVED, That the ſix months for *the ſuggeſtion*, ſhall be reckoned only from the time of the iſſuing of the prohibition, and no longer.

Salk. 554. Noy. 30. 6 Com. Dig. 141.

Suggeſtion muſt be entered.

The ſuggeſtion ought to be entered in the office, or elſe *a conſultation* ſhall go.

Memorandum.

Death of *Sir E. Saunders*.

TUESDAY, the 19th of *June*, about ten o'clock in the forenoon, SIR EDMOND SAUNDERS died at his houſe at *Parſon's Green*.

* Stopford *againſt* Haughton.

Caſe 310.

* [309]

Eaſter Term, 34 *Car.* 2. *Roll.* 532.

A judgment is good although only *twelve jurors* be returned on the panel.

MR. HOLT, in arreſt of judgment, took exception that the ſheriff had returned a panel of twelve only.

AND

STOFFORD v. HAUGHTON.

AND IT WAS HELD well enough; for the ſtatute of *Weſtminſter the Second* ſays, "The ſheriff ſhall return no more than twenty-four;" and does not ſay that he ſhall not return leſs; and before that ſtatute the number was indefinite and not aſcertained. The caſe of *Sankell v. Stocker*, *Cro. Car.* 223. and the ſame in 1 *Jones*, 245. was cited.

Caſe 311. Butler *againſt* Gorſt.

Eaſter Term, 34 *Car.* 2. *Roll* 145.

In what manner an *inſolvent debtor act* muſt be pleaded.

THE defendant pleads *quoad executionem* as to his perſon, that he was diſcharged by the act for relief of the poor priſoners, and ſays not that he was a priſoner the twenty-ninth of *May*, but only ſix months before; HELD naught.

Beſides, he does not ſay at whoſe ſuit: ALSO HELD naught.

And judgment for the plaintiff.

Caſe 312. Copping *againſt* Slaymaker.

Hilary Term, 34 *Car.* 2. *Roll* 847.

Judgment *nil capiat* cannot be pleaded *in bar* to a ſecond action for the ſame cauſe.

S. C. Ante, 248. S. C. Skin. 120. 2 Mod. 42. Cro. Jac. 284. Cro. Car. 35. Stiles, 201. 2 Wilſ. 113. 3 Wilſ. 240. 309. 1 Bl. Rep. 309. 2 Bl. Rep. 831.

COVENANT. And on a fault in the declaration there is judgment *quod quer' nil capiat per billam*; then another action is brought, and the former judgment pleaded in bar, and cited *Fenne's caſe*, 6 *Rep.* 7 *Dyer*, 371. *Lampen v. Hedgwin*, *Mod. Rep.* 207.

On the other ſide was cited *Ingram v. Trevill*, 3 *Keb.* 785.

Adjournatur.

Caſe 313. Hayman *againſt* Chope.

In EJECTMENT the allowance of a writ of error ſhall not ſtay proceedings, unleſs the party enter into a recognizance to proſecute his writ with effect. Ante, 304. 4 Burr. 2501.

IN EJECTMENT the party ought to enter into a recognizance himſelf, to proſecute his writ of error with effect; without which it ſeems the writ of error and *ſuperſedeas* ſhall be no ſtay of proceeding, but execution may be ſued notwithſtanding by 16 & 17 *Car.* 2. *c.* 8. and ſo ruled in the caſe of *Cole v. Leviſton (a)* in this court, and the caſe of *Forteſcue v.* * *Abbot.*

In this caſe the plaintiff in the writ of error is the tenant of the land, and therefore the tenant is ſuppoſed to be ſufficient ſecurity; and therefore his recognizance is enough without bail, but the practice has been otherwiſe, that bail only has been given, and no recognizance by the party, becauſe of the inconvenience of the party's coming to town.

(a) 3 Keb. 138.

MR.

MR. TREMAIN prayed time till the next aſſizes for the plaintiff in the writ of error, to give ſuch recognizance before the judge; and ſaid it was ſo done upon motion in the caſe of *Forteſcue v. Abbot* Time allowed to put in bail on a writ of error.

Anonymous. Caſe 314.

IN TRESPASS when a defendant has pleaded a title, a replication *de injuria ſua propria abſque tali cauſa* is ill (*a*). *De injuria, &c.* cannot be replied when *title* is pleaded.——Cro. Eliz. 539. 812. Cro. Jac. 225. 1 Lev. 307. 2 Saund. 294. 1 Ld. Ray. 640. 2 Ld. Ray. 1483.

(*a*) See *Crogate's caſe*, that when a defendant, in his own right, or as ſervant to another, claims any intereſt in the land, or in any *common*, or *rent* iſſuing out of the land, or any *way* or paſſage on the land in queſtion, the replication of *de injuria ſuâ propriâ* generally is bad. 1 Co. 67. See alſo White v. Stubbs, 1 Lev. 307. 2 Saund. 294. Horne v. Lewin, 1 Ld. Ray. 639. 3 Salk. 273. 356. Acket v. Vincent, 2 Ld. Ray. 1482. Cockerel v. Armſtrong, Comy. Rep. 582.

Anonymous. Caſe 315.

A *Scire facias* lies againſt the executor of bail, as well as againſt the bail themſelves. *Scire facias* lies againſt executors of bail.

Anonymous. Caſe 316.

BY the courſe of the KING'S BENCH, a man may crave *oyer* of a deed after *imparlance* as it is ſaid, but not in the COMMON PLEAS: *Quære.* In B. R. *oyer* may be craved after *imparlance.*

Anonymous. Caſe 317.

THE reaſon why upon a *ſpecial capias* in the Common Pleas, the defendant ſhall be forced to plead the ſame term without the benefit of an *imparlance* is, becauſe the whole caſe is ſet forth in the writ, unleſs it be time and place; and an imparlance is only to enable the party the better to inform himſelf of the cauſe of action, in order to his defence, which he is ſufficiently informed of by the ſpecial *capias*, and ſo needs not an imparlance. Imparlance. 2 Mod. 62. Barnes, 346. Tidd's Prac. 239.

The King *againſt* Lord Ruſſel. Caſe 318.

THE defendant was tried at THE OLD BAILEY for high treaſon, and upon his trial he challenged a juror in *London* for not having a freehold. Want of freehold is no cauſe of *challenge* on a trial for treaſon.

And reſolved by PEMBERTON *Chief Juſtice*, and the other ten judges then preſent, that want of free hold is no challenge in a trial for treaſon, much leſs in a corporation (*a*).

(*a*) * See the trial in print, with the arguments of the counſel, and opinions of the judges in the point, &c.

Memorandum.

Memorandum.

Sale of the office of prothonotary.

THIS vacation SIR THOMAS ROBINSON, one of the prothonotaries, died, and LORD PEMBERTON had the ſale of the place, and was afterwards put out.

Jones, 234.

MR. JUSTICE JONES ſworn *Chief Juſtice* of the Common Pleas in his room.

SIR GEORGE JEFFERIES *Chief Juſtice* in SAUNDERS's place.

And HOLLOWAY and WALCOT were made *Judges* of the King's Bench.

Michaelmas

Michaelmas Term,

The Thirty-fifth of Charles the Second,

IN

THE KING's BENCH.

Sir GEORGE JEFFERIES, *Knt. Chief Juſtice.*

Sir FRANCIS WYTHENS, *Knt.*
Sir RICHARD HOLLOWAY, *Knt.* } *Juſtices.*
Sir THOMAS WALCOT, *Knt.*

Sir ROBERT SAWYER, *Knt. Attorney General.*

HENAGE FINCH, *Eſq. Solicitor General.*

The King *againſt* Gibbons.

Caſe 319.

THE defendant was committed, by one of *the ſecretaries*, for treaſon, to THE GATEHOUSE, and at the Michaelmas ſeſſions at THE OLD BAILEY,

The juſtices at THE OLD BAILEY have juriſdiction only over thoſe priſoners who are in NEWGATE. S. C. 2 St. Tr. 183.

I OFFERED to make his prayer for him (according to the 31 *Car.* 2. of *habeas corpus)* to be tried or bailed.

But ruled by the LORD JEFFERIES, that THE GATEHOUSE is not a priſon within their juriſdiction; though the words of the act are, "At the next ſeſſions of *oyer* and *terminer*, or general gaol-"delivery;" and they then ſate at THE OLD BAILEY as commiſſioners of *oyer* and *terminer*, and the words of the ſtatute are * in the disjunctive: but yet reſolved that none are there within the benefit of it but thoſe in NEWGATE; although the judges at THE OLD BAILEY have a calendar of the priſoners in THE GATEHOUSE.

* [312]

Reſolved in the *Lord Shaftſbury's caſe* the ſame of THE TOWER; *Sed hoc, nec lex, nec ratio probat.*

The

Caſe 320. The King *againſt* The Mayor of Southmolton.

A *mandamus* to admit an appeal from a conviction of corporation juſtices on the 22 Car. 2. c. 1. ſhall be directed to the ſeſſion of the *town*, and not to the ſeſſion of *the county*.
S. C. Skin. 122. Loft, 325. 1 Bott's P. L. 223.

POLLEXFEN moved for *a mandamus* to the mayor of the town of *Southmolton* in *Devon*, to admit an appeal to THE SESSIONS there, from a conviction for a conventicle, made before a juſtice of the peace of the corporation.

The queſtion was, to whom the appeal ſhould be, to the ſeſſions of the town, or of the county?

IT WAS HELD that it ſhall be to the town; for the ſtatute 22 *Car.* 2. *c.* 1. ſays, "The certificate of the conviction ſhall be to the ſeſſions of the county or place," *i. e.* if by a corporation-juſtice, then to the ſeſſions of the place; if by a county-juſtice, then to the ſeſſions of the county: now though the words which give the appeal are general, yet they ſhall be conſtrued as the reſt of the act will bear. It would be idle to have the certificate of the conviction to the ſeſſions of the place, and the appeal to the county-ſeſſions; and though in ſome places the appeal will be to the ſame magiſtrate who made the conviction, by reaſon of the fewneſs of the number of juſtices in ſome towns; yet it is not to be preſumed, that they who ſerve their king and country for nothing will do otherwiſe than right: and the firſt conviction is purely the opinion of the juſtice, but the appeal is tried by the jury

Of which opinion were ALL THE COURT, and *a mandamus* was granted.

Caſe 321. Neale, and his Wife *againſt* Mallard.

Words actionable.
1 Roll Abr. 43. 66. 1 Roll Rep. 420. Cro. Eliz. 2. 648. 289. 878. Latch. 2. Cro. Jac. 430. 1 Sid. 50. 1 Lev. 205. Carter, 55. and ſee the caſe of Carſlake v. Mappledoram, 2 Term Rep. 473.

CASE for ſcandalous words ſpoken of the plaintiff's wife, *viz.* "I *have* lain with her and pockified her." HELD actionable.

Caſe 322. * Sir John Auſtin *againſt* Culpepper.

* [313]

Judgment on a declaration in an action on the caſe for forging and publiſhing an order of the court of Chancery; and charging, in another count, that the defendant, on the ſame day, made a defamatory picture, in the ſaid order, is good, though *entire damages* be given; for the forging of the order is only *inducement*, and the *order* and *libel* therein are one complicated act.——S. C. Skin. 123. Ante, 306. 1 Roll Abr. 576. Dougl. 377. 3 Term Rep. 435.

CASE wherein the plaintiff declares, that whereas there was a cauſe depending in the court of Chancery between the ſaid parties, and witneſſes ſworn and examined on the behalf of the plaintiff, the defendant, to ſcandalize the plaintiff, did forge and counterfeit an order of the ſaid court of Chancery, that *Sir John Auſtin* ſhould ſtand committed, unleſs cauſe, &c. and this did cauſe to be

written

written and publiſhed as an order of the ſaid court; and afterwards, *viz.*, the ſame day, did make the picture, or repreſentation of *a pillory*, and under the ſame did write theſe words, "For *Sir John* "*Auſtin* and his ſuborned, forſworn witneſſes, *&c.*" SIR JOHN AUSTIN v. CULPEPPER.

MR. POLLEXFEN moves in arreſt of judgment.—This declaration conſiſts of two parts, *viz.* the forgery of the order, and the figure with the words underwritten, and the damages are entire: now if either of them be not actionable, the plaintiff ought not to have judgment. Suppoſe a man ſhould bring an action for a malicious proſecution of a crime, and for words imputing the ſame crime, and damages given entirely, if the words happen not to be actionable, it will be naught. Then for the words themſelves if they had been ſpoken, they had not been actionable; for to call a man "forſworn" is not actionable, unleſs it appear that it was in a court of juſtice: now the forgery itſelf is not actionable, for he lays no damage or trouble accrued to him thereby.

MR. HOLT *è contra*. It is all but one complicated act, and the action is for libelling him in that manner: now ſuppoſing the words themſelves were not actionable, yet being publiſhed by way of libel they are ſo: there was the caſe of Colonel *King v. Lake* (*a*), before LORD HALE, where the action was for printing a petition, which he delivered to ſeveral members of the houſe of commons (having a complaint there againſt him) containing ſcandalous matter concerning him, as that he was diſhoneſt and unjuſt, and had abuſed him; and although none of theſe words * printed would have borne an action if ſpoken, yet the action was held to lie, and judgment was affirmed upon a writ of error. An *action* lies for a libel as well as an *indictment*; and a libel may be either *per ſcripta* or *per ſigna*: and here was the caſe of *Mingey v. Moodie*, where an action was brought for riding *Skimmington* (as it is called.) * [314]

PER CURIAM. It is but one complicated act, and an action lies for ſcandalizing a man by writing thoſe words, which will not, being ſpoken, bear an action: here was the cauſe of *Sir William Bolton v. Deane*, for carrying a fellow about with horns, and bowing at his door, &c.

And by THE WHOLE COURT judgment was given for the plaintiff.

(*a*) 1 Mod. 58.

Atkins *againſt* Tankard.

Caſe 323.

CASE againſt the ſheriff of *Kent*, *quod cum* a *fieri facias* was directed and delivered to him at the plaintiff's ſuit againſt *J. S.* that he, to defraud the plaintiff of his juſt debt, *falſo et militioſè re-*

The *venue* in an action for a *falſe return*, may be either in the county where the King's Bench ſits, or in that from whence the return was made.

ATKINS v. TANKARD.

tornavit quod fieri fecit ad forty pounds, and that he had no more, &c. *Ubi revera* he had to the value of the debt. After verdict for the plaintiff.

MR. HOLT took exceptions in arreſt of judgment, for that it was *retornavit apud Maidſton* in *Kent*, whereas it is no return but here in court in *Middleſex*.

PER CURIAM, held good enough, for the plaintiff has his election to bring his action either here or there, and the *tort* is there although the return be of record only here.

And judgment was given for the plaintiff.

Caſe 324. The Mayor of London, by Commiſſion.

The form in which the LORD MAYOR of *London* is ſworn into his office.

THIS being *Monday*, the twenty-ninth day of *October*, SIR HENRY TULSE, with the new recorder SIR THOMAS JENNER, came into THE EXCHEQUER, where was read a writ directed to THE CHIEF BARON and others, to ſwear SIR HENRY TULSE mayor of the city of *London*, *in manibus noſtris modo exiſtentem vigore judicii ſuper quo warranto in curia noſtra coram nobis nuper reddit*, with letters patents thereunto annexed, conſtituting him mayor of the city, *habend. officium illud quam diu nobis placuerit*; * and he took the oath of mayor there, and the corporation oaths, *&c.*

* [315]

Then he came to the King's Bench, and there THE RECORDER read a warrant of attorney written in parchment: *Civitas London ſſ. Major civitat. præd. conſtituti et in loco ſuo ponit* WILLIELMUM LIVESAY *attornatum ſuum ad omnes et omnimodas actiones ſectas et querelas pro eadam civitate proſequend. et defendend*, and then prayed it might be filed; whereas it was formerly "*Major communitas et* "*cives civitat. præd. ponunt loco ſuo, &c.*"

Caſe 325. Parkhurſt *againſt* Shefton.

Trover for *a ſuit of knots* is ſufficiently certain.

S. C. Skin. 142. 1 Mod. 46. 1 Keb. 390. 3 Keb. 253.

TROVER and converſion *de uno pari nittarum* ANGLICE *a ſuit of knots.*

After verdict it was moved in arreſt of judgment that it was too uncertain.

And of that opinion was WYTHENS *Juſtice.*

But JEFFERYES *Chief Juſtice*, HOLLOWAY and WALCOT *Juſtices*, thought it as good as "*duodecim ovibus et agnis*," which has been held good enough.

And ſo judgment was given for the plaintiff.

Mallowne

Mallowne *againſt* Fitzgerard. Caſe 326.

Michaelmas Term, 34 & 35 *Car.* 2. *Roll* 260.

WRIT OF ERROR out of *Ireland*, on a judgment in ejectment.

If a father give an eſtate in tail to his daughter, provided ſhe marry with the conſent of the truſtees, the eſtate tail is not determined by her marrying without ſuch conſent, although ſhe had notice *collaterally* of the condition on which the eſtate was given.

Special verdict, finding that *John Fitzgerard*, being ſeiſed in fee of the lands in queſtion, makes a ſettlement of them on himſelf for life, on *Katherine* his daughter and the heirs of her body lawfully begotten, and, in default of ſuch iſſue, on *Letitia*, and the heirs of her body lawfully begotten, remainder on his own right heirs, with A PROVISO, that if *Katherine* marry without the conſent of three of his five truſtees, or a man not named *Fitzgerard*, or a worthy gentleman that ſhall not immediately aſſume or take upon him the name of *Fitzgerard*, &c.; that *Katherine* was heir at law; that, at fourteen years of age, ſhe had notice *per diverſas perſonas* of her not marrying without the conſent of the truſtees, or three of them; that at ſixteen ſhe married one *Villers*, not of the name of *Fitzgerard*; and that he did not immediately aſſume the name of *Fitzgerard*; *et ſi, &c.*

S. C. 3 Mod. 28. S. C. Skin. 125. 179. S. C. Eq. Abr. 333. Lane, 60.

1 Mod. 86. 1 Lev. 21. Ray. 236. 2 Ch. Rep. 26. 1 Vezey, 387. 2 Atk. 242. 2 Com. Dig. "Condition," (L. 8.) 3 Bac. Abr. 23. 4 Bac. Abr. 313. Fearne, C. R. 176. Ambler, 256. 2 Brown Ch. Caſ. 431. Comy. Rep. 726. Co. Lit. 202. notis.

* MR. HOLT for the plaintiff in error: The queſtions there, were five; I ſhall make but three. * [316]

FIRST, Whether notice be neceſſary? and I hold that it is not.— *Firſt*, Becauſe the father has not made notice to be neceſſary. He who had the fee-ſimple might diſpoſe of it over to another; and here when the daughter claims by the proviſion of the father, and not of the law, ſhe muſt take it in ſuch form, and with ſuch proviſion as the father gives it: as for the caſe of the *Mayor of London v. Alford*, *Cro. Car.* 576. that was *a condition*, and to defeat an eſtate; but this is *a limitation*, and by way of uſe, and always favoured.— *Secondly*, By the ſame means, and for the ſame reaſon that ſhe muſt take notice of what eſtate ſhe had, ſhe muſt take notice of the limitations and qualifications of ſuch eſtate. *Dyer*, 192. *pl.* 23. The collateral limitation ſhe is bound to take notice of, as well as of the natural limitation of her dying without iſſue.—*Thirdly*, No perſon is appointed to give notice, and conſequently ſhe is bound to take notice, 4 *Co.* 80. *Guilet v. Sans. Cro. Car.* 391. Notice.

SECONDLY, The defendant's wife has the ſame means to come to the knowledge of this, as ſhe in remainder, that is to take advantage of it. *Cro. Jac.* 422. *Holmes v. Twiſt. Hob.* 51. *Jones*, 207. *Jacob v. Cooke.* The firſt objection is, the caſe in *Cro. Jac.* 56. *Curtis v. Wolvaſton.* I anſwer, that that caſe is not like to this, the condition there is to pay a legacy, which is a thing payable only on demand; but if it had been a ſum in groſs, he had been

MALLOWNE v. FITZGERARD.

bound to pay it without demand: *vide Slaning's caſe, Poph.* 104. The ſecond objection, *Francis's caſe*, 8 *Co.* 89. I anſwer, There is a great deal of difference between this and that; there was a proviſo, if he did not diſturb the executors; there he did not know by that deed who were his executors: beſides, that reſolution is collateral to the point in judgment, which was upon the pleading that there was no ſpecial act of diſturbance alledged, but only words. * And as to this I muſt put the caſe of *Williams v. Fry*, which ſee in *Mod. Rep.* (*a*) in *Ventris* (*b*), and in *Keble* (*c*). Some will ſay, that in *Francis's caſe* the ſettlement is made on the heir at law, as in our caſe, but in the caſe of *Fry v. Porter*, it is otherwiſe: but that is not the reaſon given in *Francis's caſe*, 1 *Roll Rep.* 470. *Peck v. Ingram.* There is a privity between the heir and anceſtor, and certainly privity will ſignify nothing if the heir ſhall not take notice of the anceſtor's acts. *Spring v. Lady Ceſar. Jones*, 389. 1 *Roll Rep.* 469. *Winch*, 109.

Raym. 236.

*[317]

THIRDLY, Then ſuppoſing notice neceſſary, here is ſufficient. She was told ſhe muſt marry with ſuch a one's conſent, and one of ſuch a name, elſe her eſtate would be loſt: it is true, no perſon concerned did tell her of it, but notice any way is ſufficient; a report is enough; ſhe was acquainted with the penalty: but I conceive no notice neceſſary in the caſe.

MR. HERBERT *è contra.* This proviſo is in reſtraint of marriage, which by the civil law, and the wiſdom of moſt nations is reckoned void. *Dyer*, 343. 115. It was his mind that notice ſhould be given. Conditions are private laws, and all laws derive their juſtice from this, that they are known. *Co. Lit.* 226.

1 Sid. 36.
2 Sid. 115.

There are but three caſes where notice is not neceſſary. FIRST, In caſes of *conditions precedent*, there want of notice will not excuſe. SECONDLY, Where the things that notice is required of be of a public nature. THIRDLY, Where the party impoſes the thing on himſelf. Our caſe comes within neither of thoſe. Here the feoffees or truſtees might and ought to have given notice. The notice that is found is *per perſonas diverſas*, and not ſaid who they were; nor that the names of the truſtees were told her. The true queſtion here is, whether there be not a difference between one that is heir at law, and a ſtranger in this caſe? For a ſtranger cannot take but he muſt be ſuppoſed conuſant of the conveyance by which he takes, and conſequently of the conditions and limitations annexed to his eſtate; but the heir at law only enquires whether his anceſtor were ſeiſed, and if he be dead, knowing that then of courſe it deſcends to him as heir, and is not ſuppoſed to take * notice of any eſtate by deed, and therefore notice ſeems neceſſary to him (*d*).

* [318]

(*a*) 1 Mod. 86. 300.
(*b*) 1 Ventris, 199.
(*c*) 2 Keble, 756.
(*d*) In the Eaſter term following, the judges were of opinion that the eſtate tail was not determined for want of notice; according to the reſolution in *Francis's caſe*. S. C. 3 Mod. 34; and the judgment was unanimouſly affirmed. S. C. Skin. 182.

againſt

——— *againſt* ——— Caſe 327.

CASE on the general iſſue, tried before JEFFERIES *Chief Juſtice*, at *Guildhall*.

The corporation of London were diſſolved by the judgment in *quo warranto*, and therefore *a pane* returned by *the ſheriffs*, in a cauſe in which *the city* was intereſted, was no ground to challenge *the array*.

The plaintiff declares as leſſee from THE CITY OF LONDON, by the name of "Mayor, commonalty, and citizens of *London*," for a certain toll due at *Fleet-Ditch*, upon the act of rebuilding the city of *London*.

MAYNARD *Serjeant*, makes a challenge to *the array*, for that *the panel* was made by *Peter Daniel* and *Samuel Daſhwood*, who were *freemen* of the ſaid city, and ſo parties to the ſuit.

MR. HOLT prayed the challenge might be quaſhed, for that the ſheriffs were now by patent as other ſheriffs, and not freemen of the ſaid city; and *the panel* was made by them the twenty-third of *October* laſt, ſince the judgment in the *quo warranto*.

JEFFERIES *Chief Juſtice* ſaid—"BROTHER MAYNARD, you muſt prove them freemen. I think them no more freemen than every body elſe, for I hold the corporation abſolutely diſcharged by the late judgment in the King's Bench." (*a*)

So he overruled the challenge.

A *private ſtatute* cannot be given in evidence on the general iſſue, but muſt be pleaded *ſpecially*.

Afterwards the plaintiff offered in evidence the printed ſtatute for rebuilding the city; but it was diſallowed by THE CHIEF JUSTICE, for that it is no general law no more than 1 *Eliz. c.* 19. about biſhops, parſons, &c. Beſides, an act may be general in ſome parts, and particular in others (*b*); and it can never be reckoned general in this particular, whereby it veſts a toll in the mayor, commonalty, and citizens of *London*; and for that of party-walls, it has been read in evidence on ſuch actions, but never when exception was taken thereunto: it is true, ſometimes they have brought general *indebitatus's* for money laid out on party-walls, but moſt times they declare on the ſtatute.

And at laſt a juror was withdrawn by conſent.

(*a*) But ſee ante, page 263, 279.
(*b*) See 1 Sid. 356. 8 Co. 138. 10 Co. 101. 4 Bac. Abr. 640.

Caſe 328.

* The King *againſt* Waters.

* [319] KING'S BENCH, *Trinity Term*, 35 *Car.* 2. *Roll* CROWN SIDE.

An *information* on the 5 Eliz. c. 4. for exerciſing a trade, not having ſerved an apprenticeſhip for ſeven years, may be filed in the court of King's Bench.

6 Co. 19. Hob. 183. 327. Cro. Jac. 75. 178. Cro. Eliz. 737. 1 Salk. 373. 1 Burr. 543.

BERKS *ſſ.* MEMORAND. *quod* SAMUEL ASTRY *arm. coron. et attornat. domini regis in cur. ipſius regis coram ipſo rege qui pro eodem domino rege in hac parte ſequitur in propria perſona ſua venit hic in cur. dict. domini regis coram ipſo rege tunc et ibidem et exhib. quandam* INFORMATIONEM (*a*) *verſus* WILLIELMUM WATERS *de* MAIDENHEAD *in comit.* BERKS *yeoman, quæ quidem informatio ſequitur in hæc verba.*

MEMORAND. *quod* SAMUEL ASTREY *arm. coron. et attornat. domini regis in cur. ipſius regis coram ipſo rege qui pro eodem domino rege in hac parte ſequitur in propria perſona ſua venit hic in cur. dict. domini regis coram ipſo rege apud Weſtm. die Martis prox. poſt quinque ſeptimanas Paſch. iſto eodem termino et pro eodem domino rege dat. cur. hic intelligi et informari quod* WILLIELMUS WATERS *de* MAIDENHEAD *in com.* BERKS *yeoman qui* 12° *Januarii anno regni dominæ Eliz. nuper reginæ Angliæ, &c. legitime non uſus fuit nec exercuit aliquam artem myſterium ſive manualem occupationem infra hoc regnum Angliæ vel dominior. Walliæ, poſtea ſcilicet primo die Decembris anno regni domini noſtri Caroli Secundi dei gratia Angliæ Scotiæ Franciæ et Hiberniæ regis fidei defenſor', &c.* 33°. *et continue poſtea uſque diem exhibitionis hujus informationis ſcilicet per ſpatium quinque menſium integror. et amplius vi et armis, &c. apud Maidenhead prædict. in com. præd. illicite injuſte et pro lucro ſuo proprio erexit Anglice* HATH SET UP *uſus fuit et exercuit artem et myſterium ſive manual. occupationem mercator. Anglice of a* MERCER *exiſtent. art. myſter. ſive manual. occupation. uſitat. et occupat. infra hoc regnum dict.* 12°. *die Jan. anno regni dict.* DOMINÆ ELIZABETHÆ *nuper reginæ Angliæ, &c. quinto ſupradict. in qua quidem arte myſterio ſive manual. occupation. mercator. præd. idem* WILLIELMUS *non educatus fuit ut apprenticius per ſpatium ſeptem annor. contra formam ſtatut. in hujuſmodi caſu edit. et proviſ. ac contra pacem dict. domini regis nunc coron. et dignitatem ſuas, &c. unde idem coronator et attornatus dict. domini regis pro eodem domino rege petit adviſamentum curiæ hic in præmiſſis ac debit. legis proceſſus verſus præfat.* WILLIELMUM WATERS *in* * *hac parte fieri ad reſpondend. dict. domino rege de et in præmiſſis, &c. per quod præceptum fuit vicecom. præd. quod non omittat, &c. quin venire faciat eum ad reſpondend', &c. Et modo ſcilicet die Veneris prox. poſt craſtinum ſanctæ Trinitat. iſto eodem termino coram domino rege apud Weſtm. venit præd.* WILLIELMUS WATERS *per* ROBERT SELYARD *attornat. ſuum, et habit. auditu informationis prædict. dicit quod ipſe idem* WILLIELMUS *non eſt inde culpabilis, et de hoc ponit ſe ſuper patriam, et* SAMUEL ASTREY *arm. coronat. et attornat. domini regis in cur.*

* [320]

(*a*) See *indictment* for this, ante, caſe 141. 218.

ipſius

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ipſius regis coram ipſo rege qui pro eodem domino rege in hac parte ſequitur ſimiliter, &c.

Ideo veniat inde jur. coram dicto domino rege a die Sanctæ Trinitatis in tres ſeptimanas ubicunque, &c. Et qui nec, &c. ad recogn. &c. quia tam, &c. idem dies dat. eſt tam præfat. SAMUELI ASTREY *arm. qui ſequitur, &c. quam præfat.* WILLIELMO WATERS, *&c. ad quas quidem tres ſeptimanas ſanctæ Trinitatis coram dicto domino rege apud Weſtm. veniunt tam præfat.* SAMUEL ASTREY *arm. qui ſequitur, &c. quam præd.* WILLIELMUS WATERS *per attornatum ſuum præd. Et vicecomes retorn. nomina duodecim jurator. quorum nulli, &c. Ideo præceptum eſt vicecomiti quod non omittat, &c. quin diſtringat eos per omnes terras, &c. Et quod de exit', &c. Et quod habeat corpora eorum coram dicto domino rege a die Sancti Michaelis in tres ſeptimanas ubicunque, &c. vel coram juſticiariis dict. domini regis ad aſſizas in com.* BERKS *capiend. aſſignat. ſi prius die Martis ſeptimo die Auguſti apud* ABINGDON *in com.* BERKS *præd. per formam ſtatut', &c. ven. pro defectu jur', &c. Ideo vicecom. habeat corpora, &c. ad recogn. in forma præd. idem dies datus eſt tam præfat.* SAMUELI ASTREY *arm. qui ſequitur, &c. quam præd.* WILLIELMO WATERS, &c.

On this information there being a verdict againſt the defendant for the five months.

MR. BANNISTER moved in arreſt of judgment, and the exception he took was, that the offence ought not to be proſecuted here, but before juſtices of *oyer* and *terminer*, or peace, or ſeſſions (*b*), according to the ſtatute 31 *Eliz. c.* 5: and for that he urged the caſe of *Kenne v. Drake* (*c*), about the trade of a ſpurrier, where the opinion of the Court ſeemed ſo; and the caſe of *Shoyle v. Taylor* (*d*), that it lies only in *Middleſex* where the offence was committed; and in the caſe of *Daviſon v. Barber* (*e*); and the caſe of *Nevil v. Wood* (*f*); and * in the caſe of *Sir Clement Clarke v. Foley* (*g*), in my LORD HALE's time in this court, where it was adjudged, that ſuch ſuit would not lie here, for the party ought not to be drawn out of his county to anſwer ſuch an offence as this. * [321]

I BEING OF COUNSEL *for the King* in this cauſe, anſwered to that of *Kenne v. Drake* (*h*), that there was only an opinion of two or three judges upon firſt opening, and they ſaid they would adviſe, and there was a *curia adviſare vult*, and the ſame caſe is afterwards cited in the caſe of *Shoyle v. Taylor* (*i*), in this very Court, and there ſaid to have been adjudged for the plaintiff. As for the caſe of *Shoyle v. Taylor*, MR. BANNISTER wilfully miſtook it, for it was expreſsly adjudged that it did lie, and that judgment was afterwards affirmed upon a writ of error; and that caſe is ſo far from anſwering

(*b*) See the caſe of Farren, qui tam, v. Williams, Cowp. 369.
(*c*) Cro. Car. 85.
(*d*) Cro. Jac. 178.
(*e*) Hob. 183, 184.
(*f*) Hob. 327.
(*g*)
(*h*) Cro. Jac. 85.
(*i*) Cro. Jac. 176.

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the end he cited it for, that it is directly againſt him; there it is reſolved that there is no difference between other counties and this of *Middleſex*; and ſurely it cannot be pretended that the court of Exchequer has the power of ſeſſions here in *Middleſex*, as this Court has; and therefore as to them *Middleſex* is all one with another county, and if they can hold a plea of this matter in *Middleſex*, they may in any county, for they are neither *oyer* and *terminer*, nor peace, nor ſeſſions, which are named in 31 *Eliz. c.* 5. And if they may, ſure this Court may, which is the only proper court for ſuits on penal laws; and in that caſe there is a good reaſon given for their judgment, which will hold in this, *viz.* that in 31 *Eliz. c.* 5. there are no negative words in it, and then being an affirmative it ſhall not take away the juriſdiction of this Court, which a precedent law gave it; as this of the 5 *Eliz. c.* 4. does by this clauſe, "To be recovered by bill, plaint, or information, in any of "the king's courts of record." Then for the caſe of *Daviſon v. Barber* (*k*), that is barely an opinion of the LORD HOBART, who was often ſingular in his opinion, and there is no judgment in the caſe. And for the caſe of *Nevill v. Wood*, that was in the Common Pleas, and this matter pleaded, yet I do not find any judgment there neither; and if there * were, it cannot be law; for that debt will lie here above can be no great queſtion, nor ever was it; for it can never be intended that the ſtatute of 31 *Eliz. c.* 5. ever deſigned to give the juſtices of the peace a new juriſdiction, *viz.* to have conuſans of pleas of debt; and ſo that not being ſueable below, muſt certainly be ſo here or no where. Then for *Sir Clement Clark's caſe* (*l*), it was an information upon this ſtatute, and about ſome iron-works; it was tried at the bar, and *Mr. Foley* found not guilty, it being a *qui tam*, and two hundred pounds coſts given, which occaſioned the bringing of a writ of error; but there was never any judgment given therein to this very day. Caſes for me there are enough. *The King* and *Allen v. Foley* (*m*). Information entered *int. record regis*, which certainly muſt be intended THE CROWN OFFICE: now that was the caſe of a common informer *pro lucro ſuo privato*, and yet no ſuch doubt made, though there were many other queſtions in the caſe much debated. This ſtatute, if it has any effect to take away the juriſdiction of *Weſtminſter Hall* in this matter, muſt reach to all actions as well as informations, for the words of the ſtatute are, "All ſuits, *&c.*" In *Hodges's caſe* (*n*), there was a judgment given in *Newberry*, and afterwards reverſed on a writ of error brought here in this Court; and by ROLLE reſolved, the action ought to be brought in ſome of the king's courts here. In *Miller's caſe* (*o*) it is adjudged, that the information ought to be here above in *London*, and reverſed for this cauſe: Here the king's attorney general is preſent to acknowledge or deny, as occaſion requires. *Wade, qui tam, v. Ripton* (*p*). An action

* [322]

(*k*) Hob. 185.
(*l*)
(*m*) Mich. Term, 11 Jac. 1. B. R. Roll 23. 2 Bulſt. 186.
(*n*) Stiles, 383.
(*o*) Cro. Jac. 538.
(*p*) 1 Sid. 303.

here,

here, the fact in *Cumberland*, and a ſpecial demurrer for that very cauſe; and the demurrer over-ruled; and held it lies here. In the caſe of *Barnaby v. Goodall* (*q*), error of a judgment in *Bury*, on an information on this ſtatute, and reverſed, becauſe (ſays the book) informations on penal laws ought to be brought here in *Weſtminſter-Hall*; * and there is cited the caſe of *Gregory v. Blaſhford* (*r*) to be ſo adjudged, which caſe is in 42 *Eliz.* after the making of the act. Then there is in 1 *Jones*, 193. the reſolution of the judges on the ſtatute of 21 *Jac.* 1. *c.* 16. concerning penal laws, which is to the ſame effect with that of 31 *Eliz. c.* 5. and rather larger, and there expounded thus, that if a penal law give liberty to ſue for the penalty by information, debt, plaint, &c. in any court of record, *i. e.* in any of the courts at *Weſtminſter*. And upon thoſe laws informations may be ſued here, and are not reſtrained by the ſaid ſtatute; for no information by a common informer can be brought before juſtices of peace, juſtices of aſſize, or juſtices of *oyer* and *terminer*. There is the caſe of *the King v. Moſely* (*s*), information in this Court for erecting a cottage; and it was moved to be quaſhed, becauſe it lies not in this Court; for that the 31 *Eliz. c.* 5. directs, "That the offences there expreſſed ſhall be puniſhed by "juſtices of aſſiſe, juſtices of peace in their ſeſſions, lords of leets, "and no others."

* [323]

TWISDEN *Juſtice*. It has been held upon this and other penal ſtatutes that have ſuch words, "and no others;" or, "that it ſhall "be enquired of in ſuch courts and not elſewhere;" that notwithſtanding ſuch words THE ATTORNEY GENERAL may ſue in this Court if he will, and therefore the ſtatute of 21 *Jac. c.* 16. of limitation of actions upon penal ſtatutes, names THE ATTORNEY GENERAL, that he alſo might be bound. In the caſe of *Barneſley v. Hughes*, in LORD KELYNGE's time it is held to the ſame effect.

And for this ſtatute of 31 *Eliz. c.* 5. I URGED, that here it is not ſaid the ſuit ſhall not be in any other *court* than thoſe named; but it is not in any other *county*, and the cauſe is not drawn out of the county, for it was tried at *Abingdon* in *Berks*. Then here was lately a cauſe, *the King v. Maſon*, *Trin.* 28 *Car.* 2. in the Crown-Office, an information for uſing the trade of a glover in *London*, he paid his fine in *Eaſter term* following, as appears by rule of the court, made *die Sabbati in octabis Purificationis beatæ Mariæ Virginis* in the twenty-ninth year of *Charles the Second*.

* JEFFERIES *Chief Juſtice*, thereupon ordered MR. BANNISTER and MYSELF to bring notes of the caſes cited, and they would conſider of it.

* [324]

And about the latter end of the term, JEFFERIES *Chief Juſtice* delivered the judgment of THE COURT, that they were all unanimouſly of opinion, that the *information* lay here; the trial not being drawn out of the county; the ſtatute not ſaying that it ſhall not be

(*q*) Cro. Eliz. 737. (*r*) 6 Co. 19. (*s*) 1 Sid. 359.

in

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in any other court, but only, not in any other county; and though there were ſome caſes and authorities which had denied it, yet the much major part were for it.

And ſo we had our judgment againſt the defendant.

A mercer is a trade within the 5 Eliz. c. 4. § 31.

There were ſome other exceptions which I had prepared to ſpeak to; as that *a mercer* was not within the ſtatute. But this can be no doubt, for it is well known to be a trade, and of them there is a company incorporate in *London*; it was a trade at the time of this act, and in this very act it is taken notice of as a trade or myſtery; in the clauſe that reſtrains them from taking apprentices, other than ſuch whoſe parents can diſpend forty ſhillings *per annum* of freehold; it is the twenty-ſeventh ſection, "It ſhall not be lawful for any "perſon uſing or exerciſing the myſteries or crafts of *mercer*, draper, "goldſmith, &c." So is it there reckoned a myſtery and craft, and the thirty-firſt ſection, on which our information is grounded, ſays, "Any art, myſtery, or manual occupation;" ſo that one part of the act explains the other, and if *a goldſmith* be within it, or any trade whatſoever, this is ſo alſo. The end of the ſtatute was for maintenance of ſkill in all trades, which certainly is for the weal-public; and ſtatutes beneficial to the kingdom ſhall have a liberal conſtruction, as in *Heydon's caſe* (*t*). This act is no ſuch monopoly or novelty as is pretended; as if this were an abſolute incroachment on the ſubjects liberty of trade, which the law (ſay they) univerſally allowed to all men at pleaſure, for, at the common law, trading was not ſo free as to be uſed by any man, and as many trades as he pleaſed, for as nature has given man an inclination and fitneſs to one trade more than another, ſo GOD ALMIGHTY has ordained to every man one vocation, which properly is his calling, * and to be intended by him: and of this opinion was SIR JAMES LEE *Chief Juſtice*, DODDRIDGE and HAUGHTON *Juſtices*, in the *caſe of the Bricklayers* (*v*), and that no kingdom could ſubſiſt without diſtinction of trades, and one man could not uſe two; and there they cite a notable record of *Henry the Fourth*'s time, when GASCOIGNE ſate *Chief Juſtice* here, where *a vintner* was indicted and fined for ſelling victuals; nor is this the firſt act about trade, I mean the reſtraint of trade, for by 37 *Edw.* 3. *c.* 6. (*u*) it was provided, "that artificers and handy-crafts-people ſhould hold them to their "own myſtery;" the reaſon of which proviſion was, that each might have more ſkill in that one, and the reſt of the king's ſubjects be the better provided for, which act was certainly in affirmance of the common law; ſo that our law has always taken care of trade, that each particular trade might be managed by ſkilful hands, and the common people not cheated or impoſed upon; and our act is to the ſame end, and therefore cannot with any tolerable pretence be thought inconvenient; for were every one at large to uſe any trade, none would ſpend apprenticeſhips in them; youth would be idle and corrupt, and trade fall to decay; and therefore this act ought to have a favourable and benign interpretation, for to extend it as far as

* [325]

(*t*) 3 Co. 7, 8. (*v*) 2 Roll Rep. 391. (*u*) Raſtal, fol. 16.

poſſibl

poſſible to encourage education in honeſt trades. In *Bulſtrode* (*w*) is an *anonymous caſe*, where *a woollen-draper* is reſolved within it, which is the ſame for cloth as *a mercer* is for ſilks and ſtuffs. In *the King v. Biſhop*, a ſaleſman at *Oxford*, a mercer was then agreed to be within it (*x*), but the great doubt was, if *a ſaleſman* were *a mercer* or no? A *baker* is adjudged within it, and ſo is *a brewer* (*y*), and *a barber* (*z*), and of late time *a coachmaker*, which is a new trade, and not in being at the time of making this act: in ſhort, this very trade of *a mercer* is expreſsly adjudged within this ſtatute of 5 *Eliz.* in a cauſe *Rex v. Cellers* (*a*).

* ANOTHER EXCEPTION I thought might be moved, that "*mercator*" ſignifies *a merchant*, and ſo THE ANGLICE, being another thing, makes it naught, eſpecially it being a ſuit on a penal law, wherein nothing is to be helped by intendment, or by any of the ſtatutes of jeofails. But this is good enough, for "*mercator*" is a general word for *a dealer*, or one that *buys and ſells*; and then with an *Anglice* it is rendered more particular: in *Calvin* (*b*) it is ſaid to be "*Is qui res mobiles lucri faciendi negotiandique cauſa eo animo* "*comparat et rurſus diſtrahit et vendit*," which is the exact deſcription of *a mercer*; and again he ſays, "*Mercatores dicuntur qui* "*mercibus negotiantur*," and in the country every ſhop-keeper is ſtiled a merchant: in *Gouldman* (*c*) we find *mercator* Latin for it, and for mercery the proper *Latin* word is *mercatura*; and the *Anglice* is ſurely good where the *Latin* has a colourable ſignification of that ſame thing, and ſo too *quoddam inſtrument. ferreum* ANGLICE *a gridiron*, is good (*d*). An indictment for uſing the art and myſtery *plumarii*, ANGLICE *an upholſter*, which is much worſe than ours, and held good, when this exception was taken to it (*e*).

"*Merchant*" is a general word for *a trader*, or one that buys and ſells.

* [326]

ANOTHER EXCEPTION which I thought on was, it is *artem, myſterium, ſive manualem occupationem*, and does not ſay which. But this very objection is over-ruled in *Siderſen* (*f*), and there ſaid, that all the forms are ſo, and ſo they have been ever ſince, and ſo is the information for the trade of a cutler (*g*); and by the way that was an information here in the Crown-office for a fact in *Somerſet*: ſo in the caſe of *Smart v. Marlow* (*h*), it is *artem, myſterium, et manualem occupationem*; and for a fact in *Buckinghamſhire* there is another precedent in *Thompſon*, where it is *artem, ſive myſterium* (*i*).

An information for uſing an "*art, myſtery, or manual occupation*," contrary to 5 Eliz. c. 4. without ſaying which, is good.

ANOTHER EXCEPTION, it is ſaid five months, *et amplius*, and there is penalty but a certain full month. But this very exception is over-ruled in *Sid.* 368.

An information for uſing a trade five months, *et amplius*, is good.

(*w*) Cited to be in Eaſter Term, 41 Eliz. in the Common Pleas. 2 Bulſt. 187.
(*x*) Hilary Term, 31 & 32 Car. 2. in the King's Bench.
(*y*) Rex v. Freedland, Cro. Car. 499.
(*z*) Shaw v. Tyler, Cro. Jac. 178.
(*a*) 1 Sid. 367.
(*b*) Calvin's Lexicon Juridicum, verbo "MERCATOR."
(*c*) Goodman's Engliſh Dictionary, word "MERCER."
(*d*) Ellis v. Yarrow, 1 Sid. 60.
(*e*) Rex v. Cellars, 1 Sid. 367.
(*f*) 1 Sid. 368.
(*g*) 1 Brownl. 136.
(*h*) Brown's Entries, 1 Part, 232.
(*i*) Thompſon's Pleadings, page 90.

ANOTHER

Special memorandum.

* [327]

* ANOTHER EXCEPTION, That it is an information of *Eaſter term*, and ſo the firſt day, and conſequently brought within the five months.

Anſwer, There is a *ſpecial memorandum* entered of its exhibition, viz. "*die Martis proxim. poſt quinque ſeptimanas Paſchæ*," and that is well enough; and after a verdict you will intend it five months, nothing appearing to the contrary.

But none of theſe exceptions were obſerved.

Caſe 329. The King *againſt* Pierce.

The trades of *ſoapboiling*, *calendering*, and *brewing*, though lawful, yet if carried on to the annoyance of the neighbourhood, are nuiſances.

2 Roll Abr. 140.
9 Co. 59.
Hutton, 136.
Cro. Car. 510.
Palm. 539.
Lutw. 70.
Tſem. Pl. 195.
2 Burr. Rep. 334.
3 Atkins, 21.
726. 750.
1 Hawk, P. C. ch. 75. ſ. 11.

INFORMATION for erecting and continuing a *ſoapboilery* in *Wood Street*, to the annoyance of the neighbourhood; tried before JEFFERYES *Chief Juſtice*, at *Guildhall*.

AND IT WAS HELD by him, that though ſuch a trade is honeſt, and may be lawfully uſed, yet if by its ſtench it be an annoyance to the neighbours, it is a nuiſance.

The defendant was found guilty.

NOTE, *Quod fuit ex proſecutione* JENNER *recordatoris*.

And in this caſe was remembered the caſe of *a calendar-man* here in *London*, in *Bread Street*, who was convicted before LORD HALE on ſuch an information, for that the noiſe of it diſturbed the neighbours, and ſhook the adjacent houſes: and the caſe of *The King v. Jordan* for *a brewhouſe* on *Ludgate Hill*, about a year and a half ſince; and he was forced to proſtrate the ſame, and direct it to another uſe; for that ſuch trades ought not to be in the principal parts of the city, but in the outſkirts.

Caſe 330. Jackſon *againſt* Rogers.

An action on the caſe lies againſt a common carrier for refuſing to carry goods, if he has conveniency ſo to do.

Ante, 81. 127.
Hard. 163.
1 Show. 104.
1 Salk. 18.
Ld. Raym. 654.
12 Mod. 3. 484.
Comy. Rep. 25.

* [328]

ACTION on the caſe, for that whereas the defendant is a common carrier from *London* to *Lymmington et abinde retrorſum*, and ſetting it forth as the cuſtom of *England*, that he is bound to carry goods, and that the plaintiff brought him ſuch a pack, he refuſed to carry them, though offered his hire.

And held by JEFFERIES *Chief Juſtice*, that the action is maintainable, as well as it is againſt an inn-keeper for * refuſing gueſt, or a ſmith on the road who refuſes to ſhoe my horſe, being tendered ſatisfaction for the ſame.

NOTE, That it was alledged and proved that he had convenience to carry the ſame; and the plaintiff had a verdict.

Hudſon

Hudſon *againſt* Cooke.

Caſe 331.

CASE for ſuing in an inferior court without any cauſe of action within the juriſdiction, HELD good, and judgment for the plaintiff.

Courts inferior.
S. C. 1 Vent. 369.
S. C. Skin. 131.
Poſt, 374.

And, SECONDLY, although he did not ſay *ſciens*, yet good enough, as in the caſe of *Cooper v. Cooper*, in the eighteenth year of *Charles the Second*, in the Exchequer, before HALE, where it was held good, for that in inferior courts they hold to bail in all actions, &c.

Lane *againſt* Hawkins.

Caſe 332.

Michaelmas Term, 34 & 35 *Car.* 2. *Roll* 473. 475.

EJECTMENT. A ſpecial verdict, finds that a man deviſed lands by ſeveral parcels to ſeveral; and alſo ſeveral perſonal legacies, and after ſays, "ITEM, I give all other my eſtate whatſoever, to my "dear wife, whom I make my executrix."

A deviſe of "all other my "*eſtate* whatſo-"ever," will paſs A REVER-SION in fee.
S. C. Poſt. 395.

The queſtion was, Whether this would paſs a reverſion in fee?

And there was cited *Hob.* 95. *Style*, 293. and the caſe of *Wilſon v. Robinſon* (*a*), by HALE *Chief Juſtice*, and WYLDE *Juſtice*, "all his eſtate" paſſes a fee, for that is all his intereſt; otherwiſe if it were "all his land."

Adjournatur (*b*).

(*a*) Michaelmas term, 25 Car. 2. in the King's Bench. 1 Mod. 100. S. C. 3 Keb. 180. S. C. 2 Lev. 91.

(*b*) Judgment was given for the defendant, that *the inheritance* paſſed. S. C. Poſt, 395.

Manneton *againſt* Trevilian.

Caſe 333.

Eaſter Term, 35 *Car.* 2. *Roll* 24.

REPLEVIN for ſix cows: the defendant avows for *damage feaſant*. The plaintiff replies a *ſeiſin* of certain lands, and a right to common of paſture for beaſts *levant et couchant* on thoſe lands; and that thoſe ſix cows being his cattle, and *levant et couchant* there, he put them in, &c. The defendant rejoins with an ABSQUE HOC, that thoſe were the proper cattle of the plaintiff *levant et couchant* on thoſe his lands: Demurrer thereto.

Special pleading in replevin.
S. C. Skin. 137.
1 Saund. 27. 222. 346.
2 Saund. 325. 227.
1 Mod. 63.
5 Vin. Abr. 26.
1 Burr. 319. 321.

* MR. HOLT. The property thereto is not traverſable; it may be pleaded, but it cannot be traverſed, becauſe it is admitted by the avowry; and beſides, the *levancy* is ill traverſed too. *Nelſon's Lutw.* 500, 501.

* [329]

MR.

Helſon's Lutw. 37, 38. Yelv. 36. 2 Cro 46. 2 Lev. 20.

MR. POLLEXFEN. The levancy is not the ſole meaſure of the common, but there muſt be a property alſo. 1 *Roll Abr.* 307, 308. So that the right could not be tried without that traverſe; a man cannot have common for beaſts in which he has not a general or a ſpecial property.

And THE COURT held *the traverſe* good. And judgment was for the avowant.

Caſe 334. Well *againſt* Thompſon.

A promiſe to pay in conſideration of delivering the defendant's cattle out of the pound, is good. 1 Lev. 3. 20. 70. 87. 164. 293. 2 Lev. 23. Helſon's Lutw. 79. 118.

ACTION on the caſe, for that in conſideration the plaintiff would deliver the defendant's cattle out of the pound, he promiſed to pay him, or ſave him harmleſs, &c. and avers that *pro deliberatione inde* an action was brought againſt him, and a recovery.

It was moved in arreſt of judgment, that the conſideration was naught, becauſe for doing an ill thing, *viz.* the delivery out of pound of cattle duly impounded.

But over-ruled becauſe not *a malum in ſe.*

The want of averring that which forms the ground of the action is not helped by verdict.

THEN ANOTHER EXCEPTION was taken, becauſe the plaintiff had not expreſsly averred in his declaration that he had delivered the cattle, only that an action was brought againſt him and a recovery.

THE COURT held that was not ſufficient, though after a verdict, for that it was the ſubſtantial part, and the ground of the action.

Judgment was ſtayed.

Caſe 335. Hinton *againſt* Roffee.

Trinity Term, 34 *Car.* 2. *Roll* 1182.

To debt on bond, A PLEA that it was corruptly agreed to pay more than legal intereſt is bad, unleſs it ſpecially ſtate the *corrupt agreement*, and the amount of *uſurious intereſt*. S. C. 3 Mod. 55. N. Lut. 84. 140. Stra. 498. 816. 2 Ld. Ray. 1144. Comp. 72. 671.

DEBT on a bond. The defendant pleads *quod corruptè agreatum fuit*, that intereſt ſhould be paid for it above the rate of ſix *per cent.* (*a*) The plaintiff demurs.

AND HELD good, for that the plea does not ſhew what intereſt, nor that the bond was for the very money, but only by intendment, TO WIT, *ſuper agreamento præd.* the bond was given, and does not ſay expreſsly *pro eadem pecunia.*

Judgment for the plaintiff; for that they would not eaſily avoid a bond; and the corrupt agreement * ought to be ſpecially and particularly ſet forth, and the *quantum* of intereſt, otherwiſe the plaintiff can never tell what to anſwer.

Dougl. 235. 1 Term Rep. 153. 3 Term Rep. 531.

* [330]

(*a*) See the ſtatutes 12 Car. 2. c. 13. and 12 Ann. c. 16.

The King *againſt* Enoch Woodward. Caſe 336.

By Indictment. *Mich. Term*, 35 *Car.* 2. *in B. R.* Crown Side.

THE DEFENDANT was committed by two juſtices of *Norfolk*, on the 17 *Car.* 2. *c.* 2. (the *Oxford-Act*) againſt diſſenting miniſters living within five miles of a corporation, upon oath made of his being an inhabitant within the city of *Norwich*; and being bailed in the vacation-time by Mr. Baron Atkins, upon an *habeas corpus*.

Nonconformity. Ante, 160. 205. Nelſon's Lutw. 63, 64.

I MOVED, the firſt day of this term, that his recognizance might be diſcharged, for that the warrant of commitment which here appears on the return of the *habeas corpus* was naught, it not appearing that he had been formerly a parſon, vicar, or other beneficed parſon, or had been a teacher, but only that he was an inhabitant, and ſo he is not within the words, or intended proviſion of that ſtatute, which was made againſt the reſidency of ſuch perſons within corporations; which by their teaching might ſeduce and debauch the king's liege ſubjects from their duty to their ſovereign and the church.

And of this opinion was ALL THE COURT, and the defendant diſcharged upon my motion.

(*a*) See the Toleration Act, 1 Will. and Mary, c. 18.

The King *againſt* Weaver. Caſe 337.

AN ORDER concerning money given and collected for the repair of A BRIDGE: a *certiorari* went; but through the attorney's careleſſneſs it was not delivered in time, and ſo a *procedendo* went.

If a *procedendo* iſſue on neglect to deliver a *certiorari* to remove an order of ſeſſion, the Court will not grant an *alias certiorari*.

And thereupon I MOVED for a *certiorari*, notwithſtanding *a procedendo* firſt had been granted *in hac parte*. In the book called the *Theſaurus Brevium*, there are ſeveral precedents of an *alias certiorari* to remove an indictment upon an inſufficient return to the firſt, and this is * no more: and in the office are ſeveral of this kind.

* [331]

THE COURT. It was your own fault not to deliver the firſt, and if you ſlept on the firſt, we will not help you.

Workman, qui tam, &c. *againſt* Gillard, and his Wife. Caſe 338.

ACTION of debt on the 23 *Eliz. c.* 1. for twenty pounds a month for not coming to church. On the trial the defendant was found guilty for three months.

An action on the 23 Eliz. c. 1. againſt *a wife*, ſhall not be ſtayed on the *huſband's* conforming.

Afterwards,

WORKMAN v. GILLARD.

Afterwards, *viz.* the firſt day of *Michaelmas term*, I MOVED the Court, that, we having *conformed*, our plea might be received; and that we might have leave to enter it on record. But as it fell out the biſhop's certificate was of the huſband's conformity, and the action was for the wife's not coming to church.

Court will allow time to *conform* to 23 Eliz. c. 1.

Then I MOVED for a fortnight's time, and my client would conform here in town, which ſhe did, and we got a certificate of the parſon and churchwardens of her conformity; and an affidavit likewiſe of the truth of the fact, *viz.* of her receiving the ſacrament: which plea was ingroſſed as follows.

Plea of conformity.

POSTEA *ſcilicet die Martis prox. poſt craſtin. Purificationis beatæ Mariæ virginis iſto eodem termino veniunt hic in cur' præd.* JOHANNES GILLARD *et* MAGDALEN. *uxor ejus in propriis perſonis ſuis et dicunt quod judicium ſuper veredictum in actione præd. obtent. verſus eoſdem* JOHANNEM *et* MAGDALEN. *reddi non debet, quia dicunt quod tertio die Februarii ult. præterit. eadem* MAGDALENA *uxor præd.* JOHANNIS *apud parochiam Sanctæ Mariæ le* SAVOY *in comitatu* MIDDLESEX *conformavit ſemetipſam in cauſis religionis ſecundum uſum eccleſiæ Anglicanæ et adtunc et ibidem perſonaliter acceſſit ad præd. eccleſiam parochialem Sanctæ Mariæ le Savoy in com.* MIDD. *præd. et reverenter et debite divinum ſervicium et ſermon. Anglice* SERMONS, *tunc et ibidem audivit et recepit ſacramentum cœnæ domini et ſubmiſit ſemetipſam erga præfat. dominum regem in debita ſua obedientia et devenit obediens legibus et ordinationibus eccleſiæ Anglican. prout per certificationem ſub manu reverendiſſimi in Chriſto patris Henrici permiſſione divina epiſcopi London. et cum ſigillo ſuo authentico ſigillat. curia hic prolat. et oſtenſ. liquet (cujus quidem certificationis tenor ſequitur in hæc verba.* " * *ſſ.* Theſe

Certificate of conformity.

" are to certify whom it may concern, That having received a
* [332] " certificate under the hands of *Lawrence Pocock*, curate of the
" *Savoy pariſh* in the *Strand*, in the county of *Middleſex*, and dioceſs
" of *London*, and of *Stephen Palmer*, and *Randolph Croſſe*, church-
" wardens of the ſaid pariſh, bearing date the fourth day of this
" inſtant *February*; that *John Gillard* and *Magdalen* his wife, in-
" habitants of *Bromfield* in the county of *Somerſet* (heretofore diſ-
" ſenters from the public ſervice of the church of *England*) do now
" conform to the liturgy thereof, by duely frequenting the ſame at
" the time of divine ſervice and ſermon, and ſoberly and gravely
" behave themſelves there as penitent converts; and that the third
" of *February* inſtant, the ſaid *Magdalen Gillard*, did in the ſaid
" *Savoy church* receive the bleſſed ſacrament of the Lord's Supper,
" at the hands of the ſaid *Mr. Lawrence Pocock*, according to the
" liturgy of the church of *England*: and being very well aſſured of
" the integrity of the ſaid *Mr. Pocock*, I do verily believe the ſaid
" certificate to be true in every particular: IN WITNESS whereof I
" have hereunto ſet my hand and ſeal the 4th day of *February*, in
" the year of our Lord God 1683." *Et iidem* JOHANNES GILLARD *et* MAGDALENA *uxor ejus ulterius dicunt quod poſt ſubmiſſionem et conformitatem ſuas præd. in forma prædict. fact. eadem* MAGDALENA *in ſua conformitate et debita obedientia continue poſtea ſecundum*

eundum leges et ſtatut. hujus regni Angliæ regiæ majeſtati prædict. continuavit, et adhuc remanet, et ſic remanere et continuare intendit; quæ omnia et ſingula præfat. JOHANNES *et* MAGDALEN. *parati ſunt verificare prout Cur', &c.: unde pet. judicium; et quod ipſi iidem* JOHANNES *et* MAGDALEN. *de actione præd. necnon ab omni proceſſu ſuperinde per Cur. hic dimittantur.* BARTHO. SHOWER.

Which plea in Hilary term following, I PRAYED might be received.

But THE COUNSEL *for the plaintiff* oppoſed it, ſaying it was not allowable in an action.

But THE COURT thought it a good plea.—The Court however made us pay the plaintiff his coſts, ſaying it was their indulgence that gave us leave to conform here; we ought to have done it in our own dioceſe. So at laſt we paid him his coſts, and our plea was received, and we entered it on THE ROLL, and there was an end of the ſuit.

* Fountain *againſt* Guavers.

Caſe 339.

* [333]

Trinity Term, 35 Car. 2. Roll 378.

COVENANT on an indenture of a grant of a *rent-charge* to the plaintiff, with a proviſo for entry into the lands till ſatisfaction, &c. The defendant pleads that the plaintiff entered and was poſſeſſed, &c. The plaintiff demurs.

If the grantor of a rent-charge covenant "for "him, his "heirs and ex- "ecutors, *to* "*pay*, &c." an action of covenant lies, againſt the executor, for rent accruing after the death of the grantor, although the grantee had entered, purſuant to a clauſe in the deed, for rent arrear previous to the death of the grantor. S. C. Comb. 5[illegible] S. C. Skin. 14[illegible]

MR. HOLT *for the plaintiff.* He ought to have pleaded a *diſſeiſin*, or at leaſt an *expulſion:* he cited *Coulter's caſe* (*a*), a bare entry will not ſuſpend the rent-charge, for it might be by conſent, *Dorrel v. Andrews* (*b*). *Lloyd v. Bethel* (*c*). *Lord Berkley's caſe* (*d*), cited *obiter*, a caſe of *Cook v. Cook* (*e*). They plead it to avoid a debt, and therefore ought to be ſtrict (*f*). Perhaps they will ſay it was a rightful entry; that cannot be, for we had diſtrained, which hinders us from entering; we took our election (*g*). Beſides, by the very deed we could not enter without demand on the thirtieth day, which is not ſhewn, and ſo our entry could not be lawful.

MR. PAWLET *è contra*, cited the caſe of *Peto v. Pemberton* (*h*). He ſhall never be admitted to come and ſay that he entered wrongfully, when we come and ſet forth the grant and the entry, and that rent was arrear, and that they entered *virtute conceſſionis:* all the requiſite circumſtances ſhall be intended, for they lie in their conuſance: beſides, the covenant is *ſolvere* the ſaid rent, which ſhall not be intended to heirs and executors; and "*quod ipſe ſolvet*" is the ſame, which cannot reach further therefore than his life: the infinitive mood is always ſingular or plural according to the word that

Co. Lit. 313. 1 Co. 52.

(*a*) 5 Co. 30.
(*b*) 1 Roll Abr. 138. Bridg. 55.
(*c*) Plowd. 233.
(*d*) Latch. 134.
(*e*)
(*f*) Palm. 150.
(*g*) Pennant's caſe, 3 Co.
(*h*) Cro. Car. 101.

FOUNTAIN v. GUAVERS.

goes before; as "*Petrum promiſiſſe ſolvere*," reſolve it into the potential or ſubjunctive mood with *quod* or *ut*, and it muſt be *quod ſolvet*; it is ſo here. He covenants "to pay;" as to the words, "*for himſelf, his heirs, &c.*" they do oblige them, and have their office to make good what *Cook* did undertake to do in his life-time (*i*). Beſides, * in the declaration it ſays, the executors *nec alia perſona poſſeſſionat. ſolverunt*; he ought to have ſaid *nec hæredes aut aſſignati.*

* [334]

WYTHENS *Juſtice.* As to the laſt queſtion *Mr. Pawlet*, we muſt meaſure the lien of this covenant by the eſtate in the rent, and expoſition ſhall be made of deeds ſometimes contrary to grammatical conſtruction, &c.

Co. Lit. 219. b.

Adjournatur.

(*i*) Dyer, 114. 354. Cro. Eliz. 473. Hide v. the Dean and Chapter of Windſor, 5 Co. 24. 1 Roll Abr. 521.

Hilary

Hilary Term,

The Thirty-fifth and Thirty-ſixth of Charles the Second,

IN

THE KING's BENCH.

Sir GEORGE JEFFERIES, *Knt. Chief Juſtice.*

Sir FRANCIS WYTHENS, *Knt.*
Sir RICHARD HOLLOWAY, *Knt.* } *Juſtices.*
Sir THOMAS WALCOT, *Knt.*

Sir ROBERT SAWYER, *Knt. Attorney General.*
HEANAGE FINCH, *Eſq. Solicitor General.*

The King *againſt* Coney and Obrian. Caſe 340.

THE DEFENDANTS having been convicted and attainted of murder at THE OLD BAILEY the laſt ſeſſions, came here to plead their pardon, which had not the word *murdrum* in it, but only *feloniam et interfectionem.*

Murder may be pardoned, although the word *murder* be not inſerted.

S. C. 3 Mod. 37. S. C. Skin. 157. 1 Lev. 8. 120. 2 Mod. 53. T. Jones, 56. Stiles, 375. 3 Mod. 6. Ld. Ray. 215, 637. 1 Hale, 466. 3 Bac. Abr. 806.

And it was doubted by THE COURT if it were good; and after two or three days conſideration the pardon was allowed.

And ſo had been ſeveral in this Court, and one or two on ſolemn debate, and for eight or ten years paſt the word "*murdrum*" has been generally omitted; and with a *non obſtante* (*a*), the ſtatute of 13 *Rich.* 2. *c.* 1. it has been held good; and ſo was it in this caſe.

(*a*) See 1 Will. & Mary, ſeſſ. 2. c. 2.

Caſe 341.

* Baber *againſt* Edwards and Woodall, Bail for Overton.

* [335]

Bail not liable for more than the firſt action.
Ante, 183.
1 Sid. 386.
2 Keb. 450.
1 Bac. Abr. 415.
1 Com. Dig. 690.

THE DEFENDANT was arreſted in an action of two hundred pounds, and bail is put in thereto, then the plaintiff delivers two declarations, one for two hundred pounds, and another for five hundred pounds.

And upon motion the queſtion was, Whether the bail ſhould be liable to any more than the action they were bail in?

AND RESOLVED by the Court, that they ſhould be bound no further; and that it was unreaſonable, and it would be miſchievous to the bail when they think they are only bound in one action, to have ſeveral declarations delivered *by the by* to charge them: in the caſe of *habeas corpus's* they have lately adjudged (*a*) them bound only for thoſe cauſes removed from below, &c.

See Tidd's Practice, 131.

But now *quære*, If a man be arreſted in one action of two hundred pounds, and the plaintiff afterwards declare in the ſame action to five hundred pounds, and recover by verdict five hundred pounds; ſhall the bail be liable only for two hundred pounds, or for the five hundred pounds.

In the Common Pleas they take the bail's recognizance in a ſum certain to anſwer the *condemnation*, or render the defendant's body to priſon.

MEMORANDUM. That notwithſtanding this new rule the principal ſtands liable to all declarations *by the by* as formerly.

(*a*) Richardſon's caſe, ante, 182.

Caſe 342.

The King *againſt* The Earl of Danby.

A *peer* of the realm committed by the *Houſe of Lords*, on an impeachment carried up againſt him by *the Commons*, may, on the ſeſſion being prorogued, or the parliament diſſolved, be bailed by the *court of King's Bench*, to appear

THE DEFENDANT having been a long time in THE TOWER, by commitment of the *Lord's houſe*, grounded on an impeachment of *the Commons* for treaſon, was brought hither again on his *habeas corpus*, as he had been ſeveral times before, and refuſed to be bailed.

MR. WALLOP now moves for him: The ſuperiority of THE LORDS cannot hinder. I am ſure here and there the * proceedings are all *coram rege*. The judgments here and there are the king's judgments. This Court has a double juriſdiction. FIRST, A primary direct juriſdiction. SECONDLY, A ſecondary juriſdiction to correct the errors and defects of others, and when the firſt is want-

at the bar of the Houſe of Lords on the firſt day of the enſuing ſeſſion, or meeting of parliament.——S. C. Skin. 56. 162. S. C. 3 St. Tr. 742. 1 Mod. 144. 12 Mod. 441. 1 Ld. Ray. 603. 2 Ld. Ray. 789. 1105. 3 Peer Wms. 134. 2 Bl. Rep. 757. 1 Bac. Abr. 224. 2 Hawk. P. C. ch. 15. ſ. 73.

* [336]

ing

ing the other may be had: *habetur ex obliquo quod non habetur in directo:* he cited 2 *Inſt.* 83. 23. and *Keilway*, 106. and *Coke's Comment.* (*a*) where he ſays, "*Placita curiæ ſuperioris non ſequentur curiam inferiorem,*" unleſs there be a failure of juſtice, which there muſt be here unleſs your lordſhips do relieve him. He cited *Cro. Jac.* 356. 543. *Lamb. Archaion.* 119. 2 *Inſt.* 408.

MR. POLLEXFEN of the ſame ſide, firſt taking my *Lord Danby's* pardon out of the caſe, whether or no his being impeached and the parliament diſſolved, he may not be bailed.—FIRST, This is a judicial proceeding in parliament, and not relating to their legiſlative power; now during no parliament this is the ſupreme court in being for the defence of the king's prerogative; and by the diſſolution of the parliament all the judicial proceedings there are diſcontinued, and the inferior courts are let into their juriſdiction. The Year Book, 1 *Hen.* 7. *pl.* 19. ſays, if the parliament be diſſolved, the proceedings are diſcharged: he cited *Cro. Jac.* 341. *Latch.* 57. *Noy*, 76. It is true, there have been ſome orders of the Lord's Houſe ſince to the contrary, but that cannot make any alteration of the law; and the practice is ſo. Though proceedings in inferior courts are ſuperſeded during their ſeſſion, yet upon a diſſolution they proceed here below: and ſo is the law and ſo is the practice, and this is ſo in caſes originally beginning there. If any perſons are committed upon complaints there, when the parliament is diſſolved they have always been diſcharged: the *caſe of Fitzharris* did go much further, and if that impeachment did not hinder this Court from *trying*, ſure this will not hinder from *bailing:* you bail here though you cannot try here, though the facts are triable other where, as for murders or felonies committed in *Ireland*, or on the high ſea: this Court has the general care of the king's prerogative and the ſubjects * liberty. *Co. Lit.* 289. 'Till within ſeven years, there was never any ſuch queſtion: the *Lord Shaftſbury's caſe* was when the parliament was ſitting, and only adjourned; *Lord Stafford's caſe* (*b*) was upon a prorogation to a day certain: beſides, we have a pardon to this very impeachment, which is certainly good. In the fourth of *Charles* the Firſt, *Mainwaring* was impeached and yet pardoned (*c*). In 13 *Edw.* 3. it is deſired there that no pardon ſhould be without conſent of parliament (*d*). The cauſe we inſiſt on of his being bailed, ariſes from the parliament, *viz.* the diſſolution; for during the ſeſſion we had no colour to deſire it, for then we might be brought to anſwer, but now we cannot: in *Ruſhworth* (*e*), as to the order of the Houſe of Lords of the ninth of *March*, 1679, that is, "that all impeachments ſhall ſtand *in ſtatu quo*;" not that all im-

* [337]

(*a*) See the Commentary on the twelfth chapter of MAGNA CHARTA, 2 Inſt. P. .

(*b*) Raym. 381. See alſo Carth. 132. and 2 Hawk. P. C.

(*c*) Cotton's Records, 138; the ſtatute 21 Rich. 2. c. 3. Raſtal's Old Statutes, 51 Edw. 3. Remembr. 9. Parliam. Roll. 21 Rich. 2. 2d part Membr. 13. 17 Parliament Roll.

(*d*) Rich. 2. Pleſſington's caſe, 8 Hen. 4. 2 Inſt. 187. 4 Inſt. 71.

(*e*) Page 607.

THE KING v. EARL OF DANBY.

peachments and commitments ſhall (*f*). Impeachment and commitment are not ſo nearly linked, the one is not an incident to the other; for this lord was impeached, and not committed till the next parliament; and ſo was my *Lord Scroggs*'s impeachment, and yet not committed at all: the commitment is not "till he be diſcharged "by this Houſe," but "till he be diſcharged by due courſe of "law." This Court has juriſdiction of the cauſe originally. *Pritchard* was committed by the Houſe of Lords, and on a prorogation diſcharged (*g*). *Okey*, *Bankes*, and *Corbet* were attainted in parliament, and brought over from beyond the ſeas; the parliament was prorogued; the record was removed by *certiorari* to the Chancery, and from thence by *mittimus* hither; and, upon this, execution awarded, &c. During the ſeſſion there could not be any proceeding; yet in the abſence of this parliament an authority was delegated upon this Court.

At laſt PER TOUT LE COURT he was bailed to appear at the Lord's bar the firſt day of the then next parliament (*h*). And the next day my *Lord Bellaſyſe*, *Lord Powis*, and *Lord Arundell* were alſo bailed (*i*).

*[338] *MEMORANDUM, That at the next parliament, which was in the firſt year of *James the Second*, they appeared and were diſcharged. And it was noted in the Lord's houſe, that a prorogation diſcontinued all proceedings there.

(*f*) Cro. Jac. 381.
(*g*) Pritchard's caſe, Eaſter term, 16 Car. 2. B. R.
(*h*) 2 State Trials, 759.
(*i*) 2 State Trials, 750.

Caſe 343. Hoare *againſt* Clement.

Admiralty juriſdiction. 6 Mod. 11. 25. 79. 1 Lev. 243. 267. 1 Salk. 31. 33, 34. 424.

THE DEFENDANT libels in *the Admiralty* againſt a ſhip, and one *Harris* the maſter of her, and *Smith* her late owner, and *Hoare* my client, the plaintiff, now owner, for ſails and other neceſſaries found to the ſhip in 1681.

The plaintiff ſuggeſts the ſtatute of 13 *Rich.* 2. *ſt.* 1. *c.* 5. and that the materials, work done, and contract made, and every thing contained in the libel were done on land, and not *ſuper altum mare*; and that in *July* laſt, after the time ſpecified in the libel, the plaintiff bought the ſhip *cum omni apparatu* for a conſiderable ſum of money at land.

This ſuggeſtion I drew; and thereupon I moved for *a prohibition*, for though the ſails were for the ſhip, and done about it, yet they were not abſolutely neceſſary, nor was it in a voyage; ſo that the libel is not for any ſuppoſed *hypothecation* by the maſter in a time and caſe of urgent neceſſity: beſides, we bought her upon land with all her furniture, and the defendant has his action at law upon his contract, and for his wares ſold: and in *Cro. Jac.* 514. is an expreſs caſe,

1 Salk. 34, 35.

caſe, *Violet v. Blague*, a ſhip lying at anchor is not within the admiral's juriſdiction: here was the caſe of *Meuxin v. Penſilminian*, about laſt term was twelve months, in which my LORD JEFFERIES was then of counſel, and a prohibition was granted after ſeveral debates upon this very ſuggeſtion: in the caſe of *Leigh v. Burleigh*, *Owen*, 102. is a caſe much like this; A maſter of a ſhip buys ſails, cloths, and other things, and they were delivered to him a-board his ſhip that was in *the Thames*, and a prohibition granted, becauſe *corpus com.* Beſides it appears here, and that by their own libel, that the ſhip was in a port, and that we had bought her ſince; and this caſe is expreſsly within the words of the reſolution of the admiral juriſdiction in *Cro. Car.* 216. it is in the old * edition, but not in * [339] the laſt; and it is in *Hugh's Abr.* that a prohibition ought to go: the caſe was, that ſails and other goods were delivered on board in a port; then the owner ſells her with the furniture, and the old owner and the maſter run away, and they would ſaddle the buyer with theſe things in the admiralty; whereas no action lies at law for the ſame.

MR. JONES on the other ſide would have had us put in bail here for the defendants in the Admiralty. I offered it for ourſelves, for we had nothing to do with any other perſon. We had bought the ſhip and paid for her.

At length *a prohibition* was granted as to the ſhip, and my client *Hoare*, *&c.*

The King *againſt* Snead. Caſe 344.

KING'S BENCH. *Michaelmas Term*, 35 *Car.* 2. *Roll* 68.
CROWN SIDE.

MIDDLESEX to wit. Be it remembered, that at a general quarter ſeſſion of the peace of our Lord the King, holden for the county of *Middleſex*, at HICKS'S HALL, in *Saint John's Street*, in the county aforeſaid, on *Monday*, to wit, the ninth day of *July*, in the thirty-fifth year, &c. before *William Lord Craven*, Sir *William Smith*, Baronet, &c. by the oaths of *William Cocker*, *A. B. C. D. &c.* good and lawful men of the county aforeſaid, then and there ſworn and charged to enquire for our ſaid lord the king, and the body of the county aforeſaid, it was preſented in manner and form as appears in a certain indictment hereto annexed; that is to ſay, THE JURORS for our lord the king, upon their oath, preſent, &c. That whereas on the fourteenth day of *February*, in the thirty-firſt year of *Charles* the Second, *Greenhill Dudley* was intruſted by *Chriſtopher Truſſe*, and *Clement Heddington*, with divers quantities of timber, the ſame as a factor, for their beſt advantage to ſell and diſpoſe; and that the ſaid *Dudley* authorized *Snead* by a certain inſtrument in writing to ſell them for the uſe aforeſaid, and

Indictment for cheating, &c.

THE KING v. SNEAD.

received an inventory with a bond to render a true account; and the ſaid *Dudley* delivered the ſaid writing to one *Chauſe*, to be carried to an unknown perſon for the uſe of the ſaid *Truſſe* and *Heddington*; and the ſaid *Snead* and *Chauſe* being perſons of ill fame, and intending to deceive *Truſſe* and *Heddington* of the ſaid timber, he the ſaid *Henry Chauſe* delivered the ſaid writings to the ſaid *Snead*; * whereby a true account of the ſaid timber could not be had, to the damages of the ſaid *Dudley*, *Truſſe*, and *Heddington*, and *contra pacem*, &c.

* [340]

See 5 Co. 72, 73. and Paſch. 2 W. & M. B. R. Paine v. Partridge.

I MOVED to quaſh this indictment, the matter thereof being a ground for an action on the caſe and no more; for, at this rate, all actions may be turned into indictments. This concerns only the intereſt of a particular perſon; and for a private wrong an indictment lies not; no more does it for a nuiſance to an horſeway, unleſs it be an highway, as is *Madox's caſe* (*a*). This is merely a breach of truſt, which properly belongs to the chancery juriſdiction. In *Roll's Abridgment* (*b*) the firſt caſe is much like this; an apprentice, having got a ſingle woman with child, abſconds, and a warrant is ſued againſt him, and J. S. knowing of the warrant, receives and comforts him, ſo that he could not be apprehended, and adjudged not puniſhable, it not being a warrant for treaſon or felony: as well as this any carrier may be indicted for loſing the goods wherewith he is intruſted: ſuppoſe a factor having received a *bill of lading* of goods, ſhould deliver the ſame to the maſter of the ſhip, whereby the maſter becomes leſs chargeable with the goods, and the owners happen to loſe them, yet I hope this will be no offence, becauſe a truſt repoſed in the party, and he is no officer, nor does it any way concern the republic. Even in caſe of a deceit an indictment will not lie where the perſon injured repoſed a confidence in the party by intruſting him. So it is for goods of the party's own delivery; if I ſell them this will not be an offence, for the law takes no care to puniſh a man for the breach of a truſt repoſed by the party, and not by the law. There is a vaſt difference between this and a cheat in trade; for the public is concerned in the male-adminiſtration of trades and handicrafts: (*c*) a *devaſtavit* in an executor, may with more colour be puniſhed as a crime than this; and the like of guardians miſbehaviour, becauſe there is a confidence repoſed in them by the law; nay, a man may be puniſhed for ſpending money borrowed, *per quod* he diſables himſelf to repay his juſt debts, * for he is not intruſted by the law in this caſe, to re-deliver theſe writings. It is the duty of every artificer or tradeſman, antecedent to his being employed by a particular perſon, to uſe his art duly and juſtly as he ought. But it is not my duty, antecedently to my undertaking, to do as J. S. orders, impowers, or entruſts me to do. Deceitfully to help and aid a debtor in abſconding, or avoiding the payment of a true debt, whereby the creditor is hindered or cheated

* [341]

(*a*) Cro. Eliz. 63.
(*b*) 2 Roll Abr. "Indictment," 75.
(*c*) See Rex v. Wheatley, 2 Burn. 1125. S. C. 1 Black. Rep. 273.

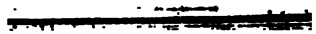
of

of his debt will not be a crime indictable. To make an offence there muſt be a breach of ſome duty which I am obliged to, as the preſervation of the peace, maintenance of trade, ſafety of travelling, or the like: beſides, the owner's conſent purges the offence; as if he deliver me a horſe with his own hands, I am not indictable for a treſpaſs if I kill him. Suppoſe two men having a controverſy about the property of goods, ſhould deliver them to me to keep ſafe until an arbitration be ended, or a wager determined, and I deliver them to him that has not the right, and this with a confederacy between him and me to the damage of the other, an action will certainly lie againſt me, but ſcarce an indictment, which is very near our caſe.

See 6 Mod. 42. 61. 105, 301, 302. 1 Salk. 286. 379.

But THE COURT thinking it a fraud would not quaſh it, but ordered us to try it that the fact might appear.

Eaſter



* Eaſter Term,

The Thirty-ſixth of Charles the Second,

IN

THE KING's BENCH.

Sir GEORGE JEFFERIES, *Knt. Chief Juſtice.*

Sir FRANCIS WYTHENS, *Knt.*
Sir RICHARD HOLLOWAY, *Knt.* } *Juſtices.*
Sir THOMAS WALCOT, *Knt.*

Sir ROBERT SAWYER, *Knt. Attorney General.*
HEANAGE FINCH, *Eſq. Solicitor General.*

Day *againſt* Wyman.

Caſe 345.

Infant appears by attorney. See 2 Inſt. 390. 1 Roll Abr. 747. pl. 13. 3 Cro. 42. 541, &c. Nelſon's Lutw. 111. 113, 302.

ERROR on a judgment in the court of Common Pleas. The defendant in the action aſſigns for error, that he was within age, and appeared by attorney and concludes, *Et hoc paratus eſt verificare prout Cur'*, &c. The plaintiff replies *In nullo eſt erratum.*

MR. POWIS *for the plaintiff* in the action argued, that the error is ill concluded, for it is an error in fact, and ſo triable *per pais* and not by the court as a demurrer or the like is; and cites the caſe of *Car v. Barker* (*a*), the ſame exception, and *King v. Goſper* (*b*), and *Hancock v. Prout* (*c*), and *Hill v. Boomer* (*d*).

MR. POLLEXFEN *è contra.* That *in nullo eſt erratum* hath helped it.

And THE COURT inclined ſo too.

Sed Adjournatur.

(*a*) Cro. Jac. 250.
(*b*) Yelv. 58.
(*c*) 1 Sid. 429.
(*d*) Trinity term, 30 Car. 2. in the King's Bench, Roll 952.

Blackway

Caſe 346. Blackway *againſt* Betton.

An adminiſtrator nonſuited in *Trover* on a converſion in his own time ſhall pay coſts.

ADMINISTRATOR brings an action of *trover* for a converſion in his own time, and is nonſuit: The defendant ſhall have coſts: ruled ſo by THE WHOLE COURT, and ſo adjudged in the caſe of *Akry v. Heard*, *Cro. Car.* 219; and *Worfield v. Worfield*, *Latch.* 220. (*a*)

(*a*) But ſee Peacock's caſe, Jones, 29. Bull v. Palmer, 2 Lev. 165; the caſe of Maſon v. Jackſon, 3 Lev. 60. *contra*; and in the caſe of Cockerill v. Kingſton, 4 Term Rep. 277.

Caſe 347. * The King *againſt* Strange.

* [343] KING'S BENCH. *Eaſter Term*, 36 *Car.* 2. *Roll* 93. CROWN SIDE.

Indictment for erecting a cottage contrary to the 31 Eliz. c. 7. muſt ſtate that there were not four acres of land annexed to it.

Ante 280.

DEVON to wit. Be it remembered, that at a general quarter ſeſſions of the peace of the lord the king, holden at the *Caſtle of Exeter*, in and for the county of *Devon* aforeſaid, on the fifteenth day of *January*, in the thirty-fifth year of the reign of the lord *Charles the Second*, by the grace of God of *England*, *Scotland*, *France*, and *Ireland*, king, defender of the faith, &c. before *John Beare*, *John Quick*, *Gilbert Yard*, and *Hugh Stafford*, Eſquires, and others their fellows, juſtices of our ſaid lord the king, aſſigned to keep the peace in the county aforeſaid, and alſo to hear and determine divers felonies, treſpaſſes, and other miſdemeanors committed in the ſame county, upon the oath of twelve jurors, good and lawful men of the county aforeſaid, impanelled, ſworn, and charged to enquire for our ſaid lord the king, and the body of the county aforeſaid, it was preſented, that *Walter Strange* the elder, of the city of *Exeter*, in the county of the ſame city, *helliar*, on the tenth day of *December*, in the thirty-fifth year of the reign, &c. with force and arms, &c. at the pariſh of *St. Leonard*, within the county of *Devon* aforeſaid, a certain cottage there before that time unlawfully erected for habitation from the tenth day of *December*, in the year aforeſaid, by the ſpace of one whole year from thence next following, unlawfully held and continued in manifeſt contempt of the ſaid lord the now king, againſt the form of the ſtatute in ſuch caſe made and provided, and alſo againſt the peace of the ſaid lord the now king, his crown and dignity.

I MOVED for the quaſhing this indictment, becauſe it does not ſay there were not four acres of land aſſigned thereto, which if there were, it is no offence within the ſtatute againſt inmates and cottages; and for this exception it was quaſhed upon my motion.

An indictment found 15 January, ſtating the continuance of the offence for *one year* from 10 Dec. *Qu.* If good.

ANOTHER EXCEPTION I had fatal thereto, which is, that it is for continuance of a cottage unlawfully erected by the ſpace of one year, from the tenth of *December*, in the thirty-fifth year of *Charles*

the

the Second, and the indictment is taken the fifteenth of *January* in that year.

THE KING v. STRANGE.

Quære. If in thoſe indictments for continuance of cottages, they ought not to ſay they were inhabited during the time they are continued; for it ſeems *prima facie* that ſuch continuance is no offence, unleſs * the cottage be inhabited, on this reaſon, becauſe by the ſtatute 31 Eliz. c. 7. (*b*) the four acres of land are to be aſſigned to be occupied therewith ſo long as it ſhall be inhabited; and therefore if never inhabited, there needs not four acres, nor can four acres be occupied therewith, unleſs it be inhabited. A houſe built not for habitation, but for another uſe, as a granary or the like, is not a cottage within this law, but if afterwards uſed for habitation, it becomes ſuch, and the continuance is an offence, therefore *è contra* if not inhabited the continuance can be no offence; for by it, unleſs inhabited, there is no damage to the public, nor ſeems it within the intention of the ſtatute, which by its proviſion againſt inmates, ſeems deſigned to prevent the increaſe of poor families, &c. If it ſhould be otherwiſe than a cottage once erected for habitation, though afterwards converted to another uſe, yet its continuance would be an offence, which ſeems an hardſhip: conſider of this, for on firſt thoughts there is ſome ſemblance of reaſon of it.

An indictment on 31 Eliz. c. 7. for erecting a cottage, muſt ſtate that it was erected for the purpoſes of *habitation*. 1 Salk. 162.

* [344]

(*b*) Repealed by 15 Geo. 3. c. 32.

Vaſper and his Wife *againſt* Eaſt. Caſe 348.

THE DEFENDANTS having an action of treſpaſs for an aſſault brought againſt them in *Windſor court*, and bringing an *habeas corpus* thereon, delivered it in open court.

Precedent of a writ of *habeas corpus* directed to THE STEWARD of *Windſor Court*.

But MR. STAPLES *the ſteward* there took exceptions thereto, and refuſed to allow it, which, becauſe it ſhews the title of the *conſtable of Windſor*, I have here tranſcribed the ſame.

CAROLUS SECUNDUS *dei gratia Angliæ Scotiæ Franciæ et Hiberniæ rex fidei defenſor, &c.* HENRICO *comiti Arundel domino Mowbray conſtabular. honor. et caſtr. domini regis de* WINDSOR. *in com.* BERKS *cuſtod. totius foreſtæ ibid. ſeu ejus locum tenent. vel deputat. ſalutem.* PRÆCIPIMUS *tibi quod corpora* JACOBI EAST *et* M. *uxor. ejus et* JOHANNIS EDMUNDS *in priſona noſtra ſub cuſtod. tua ut dicitur ſub ſalvo et ſecuro conductu una cum die et cauſa captionis et detentionis ſuæ quocunque nomine iidem* JACOBUS *et* M. *uxor. ejus et* JOHANNES *cenſeantur in eadem habeas coram nobis apud Weſtm. die Martis proxim. poſt octab. Purificat. beatæ Mariæ Virginis ad faciend. et recipiend. ea omnia et ſingula quæ curia noſtra* * *coram nobis de eo adtunc et ibid. conſideraverit in hac parte, et habeas ibi tunc hoc breve. Teſte* GEORGIO JEFFERYES *Mil. apud Weſtm. viceſimo die Novembris anno regni noſtri triceſimo quinto.* HENLEY. THACKER.

* [345]

The

VASPER v. EAST.

The exceptions he took were,

FIRST. The wife's name was not inſerted.

SECONDLY. *Lord Jefferies* was not ſtiled *Baronet.*

An attachment lies againſt the judge of an inferior court, for not returning a habeas corpus.

And thereupon, although he took the fee for allowance, he returned not the writ, but went on to try the cauſe, and thirty pounds damages were given for a paltry battery: upon *an affidavit* of all which,

I MOVED for *an attachment* againſt THE STEWARD, and had it granted, unleſs he paid us our *coſts*, occaſioned by not returning the writ, and return it in two days, which at laſt he did.

Uxor is a ſufficient addition.

As to the exceptions it is well enough, being "*uxor*," which is a ſufficient *addition*, and he ought to have returned the cauſes where *Eaſt* was concerned.

Teſte of a hab. cor. good, without the *title* of the chief juſtice.

And as to *the title* of THE CHIEF JUSTICE, it was never added at all formerly in *the teſte* of writs, but only the name, and now it is as often omitted as uſed, and wholly immaterial.

Caſe 349. The Governor and Company of Taylors in Exeter, *againſt* Clarke.

Hilary Term, 35 and 36 Car. 2. Roll 761.

Pleadings in debt on bond given to the Maſter and Wardens of the company of Taylors, in Exeter, not to exerciſe the ſaid trade in the ſaid city, otherwiſe than as a journeyman.

Civit. EXON. *ff.* MEMORAND. *quod alias ſcilicet termino Sancti Michaelis anno regni domini Caroli Secundi nunc regis Angliæ, &c.* 33. *coram domino rege venerunt gubernatores et gardiani fraternitatis ſciſſor. infra civitat.* EXON *per* JOHANNEM ETHERIDGE *attornat. ſuum et protulerunt hic in cur' dict. domini regis tunc ibidem quandam billam ſuam verſus* THOMAM CLARKE *de civit.* EXON. *taylor alias dict.* THOMAM CLARKE *de* TIVERTON *in com.* DEVON. taylor *in cuſtod. mar', &c. de placito debiti: et ſunt pleg. de proſequend. ſcilicet* JOHANNES DOE *et* RICARDUS ROE *quæ quidem billa ſequitur in hæc verba.—ff. Civit.* EXON. *ff. Gubernat. et gardiani fraternitatis ſciſſor. infra civitat.* EXON. *queruntur de* THOMA CLARKE *de civitat.* EXON. taylor *alias dict.* THOMA CLARKE *de* TIVERTON *in com.* DEVON. taylor *in cuſtod. mar. mareſc. domini regis coram ipſo rege exiſtente* * *de placito quod reddat eis quadragint. libr. legalis monet. Angliæ quas eis debet et injuſte detinet pro eo* VIZ. *quod cum præd.* THOMAS *decimo ſeptimo die Octobris anno regni domini Caroli Secundi nunc regis Angliæ, &c. triceſimo primo apud civitat.* EXON *præd. in com. civitat. præd. per nomen* THOMÆ CLARKE *de* TIVERTON *in com.* DEVON taylor *per quoddam ſcriptum ſuum obligator. ſigillo ipſius* THOMÆ *ſigillat. curiæq; dict. domini regis nunc hic oſtenſ. cujus dat. eſt eiſdem die et anno cognovit ſe teneri et firmit. obligari præfatis gubernatori et gardianis fraternitat. præd. in præd. quadragint. libris ſolvend. eiſdem guber-*

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natori et gardian. fraternitat. præd. cum inde requiſit. eſſet, præd. tamen THOMAS *licet ſæpius requiſit. &c. præd. quadragint. libr. præfat. gubernatori et guardianis fraternitat. præd. nondum ſolvit ſed ill. eis hucuſque ſolvere omnino contradixit et adhuc contradicit ad damnum ipſorum gubernatoris et guardianor. fraternitat. præd. triginta librar. Et inde producunt ſectam, &c. Et modo ad hunc diem* SCILICET *diem Mercurii proxime poſt octab. Sancti Hillarii iſto eodem termino uſque quem diem præd. præfat.* THOMAS *habuit licentiam ad billam præd. interloquend. et tunc ad reſpondend', &c. coram domino rege ven. tam præfat. gubernator et gardiani fraternitatis præd. per attorn. ſuum præd. quam præd.* THOMAS CLARKE *per* WILLIELMUM TURBIT *attorn. ſuum, et idem* THOMAS *defend. vim et injur. quando, &c. et petit auditum ſcripti obligator. præd. et ei legitur in hæc verba.* " *ſſ.* NOVERINT " UNIVERSI *per præſentes me* THOMAM CLARKE *de* TIVERTON " *in com.* DEVON taylor *teneri et firmit. obligari gubernatori et* " *gardianis fraternitatis ſciſſor. infra civit.* EXON *in quadraginta* " *libris legalis monet. Angliæ ſolvend. iiſdem gubernatori et guardia-* " *nis ſeu eorum alicui, vel eorum certo attornat. ſucceſſor. ſeu aſſignat.* " *ſuis, ad quam quidem ſolutionem bene et fidelit. faciend. obligo me* " *hæredes executores et adminiſtrat. meos firmit. per præſentes ſigillo* " *meo. ſigillat. dat. decimo ſeptimo die Octobris anno regni domini noſtri* " *Caroli Secundi nunc regis Angliæ* 31. *annoq; domini* 1679."—*Petit etiam auditum conditionis ejuſdem ſcripti obligator', et ei legitur in hæc verba.* " *ſſ.* The condition of this obligation is ſuch, that if the " above-bounden *Thomas Clarke*, his executors or adminiſtrators, ſhall " and do well and truly pay, or cauſe to be paid, unto the maſter or " wardens of the fraternity above-named, their ſucceſſors and aſ- " ſigns, the ſum of twenty pounds of lawful money of *England*, " within one month next after he the ſaid * *Thomas Clarke* ſhall ſet * [347] " up, uſe or exerciſe, directly or indirectly, in any manner of wiſe, " to and for his own proper uſe, gain and advantage, the art, trade, " or occupation of a taylor, or keep any cutting-board, or make " any manner of garments whatſoever within the city of *Exon*, or " county of the ſame city, other than his own wearing apparel, or " as an hired journeyman with a freeman of the ſaid fraternity; and " alſo if the ſaid *Thomas Clarke*, ſhall and do leave his habitation " and dwelling within the city and county of *Exon*, and depart from " thence elſewhere to live and reſide, without returning to the ſaid " city and county again to live and inhabit, within forty days next " after notice to him given by the beadle of the ſame fraternity for " the time being; then this obligation to be void, or elſe to remain " and be in force and virtue." — *Quibus lectis et auditis idem* THOMAS *dicit quod ipſe de debito præd. virtut. ſcript. præd. onerari non debet quia dicit quod ante confectionem ſcripti præd. ſcil.* 16. *die Octobris anno* 31. *ſuprad. apud civit.* EXON *præd. gubernator et gardiani fraternitat. ſciſſor. infra civit.* EXON *præd. clamantes et indebite prætendentes ſe fore corpus politicum et incorporat. pretextu literarum patent. dominæ Elizabethæ nuper reginæ Angliæ magiſtro et guardian. et ſocietat. ſciſſor. ejuſdem civitat. confect. quodque nulla perſona non exiſtens liber* ANGLICE free *ac membrum ejuſdem incor-*

porationis

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porationis fraternitatis ſciſſor. debuit uti pro ſuo proprio lucro proficuo aut advantagio arte myſterio facultate ſive manual. occupatione ſciſſoris aut conſuere veſtimentum aut alias res hujuſmodi artem tangent. infra eandem civitat. EXON *aut com. ejuſdem civitat. licet hujuſmodi perſona in eadem arte optime inſtruct. educat. et expert. fuit ac reſidens et inhabitans infra eandem civitat. et com. ejuſdem civitat. ſed quod ipſi iidem gubernator et guardiani ac liberi homines ejuſdem fraternitat. ſciſſor. tantum et nulli alii eadem arte myſterio et facultate in eadem civitate et com. ejuſdem civit. uti et exercere debuerunt, ubi revera iidem gubernator et guardiani fraternitat. ſciſſor. hujuſmodi libertat. privileg. et franchef. infra eand. civit. vel com. ejuſd. civit. de jure non habuerunt nec gaviſi fuerunt, nec iidem gubernatores et guardiani fraternitat. ſciſſor. ad impediend. reſtringend. et deprivand. præd.* THOMAM CLARKE *in ſcripto præd. ſuperius nominat. colore præmiſſ.* • [348] *ab occupatione uſu et exercitio artis * myſterii et facultatis ſuæ ſciſſoris in eadem civitat.* EXON *et com. ejuſdem civitat. (in qua quidem arte præd.* THOMAS *adtunc et ibid. fuit bene et ſufficient. inſtruct. educat. et maxime expert.) ac a libertate ſua in hæc parte reſtringend. et deprivand. ac ipſum* THOMAM *ab eadem civitat. habitation. et familia ſua ibid. ad libitum ipſorum gubernator et guardian. ejuſdem fraternitat. detrudend. et expellend. præd. decimo ſexto die Octobris anno ſupradict. apud civitat.* EXON. *præd. præd.* THOMAM CLARKE *adtunc et ibidem nimis gravaminibus et injuriis affecerunt, et ipſum in uſu et exercitio artis ſciſſoris qua ipſe* THOMAS, *adtunc et ibidem, utebatur et legitime exercuit, adtunc et ibid. diſturbaverunt et impediverunt ac præd. negotia præd.* THOMÆ *adtunc et ibid. infect. remanſerunt quouſque præd.* THOMAS CLARKE *ad redimendam vexationem in hæc parte et pro liberatione ſua abinde eiſdem gubernator. et guardian. fraternitat. ſciſſor. præd. ſcript. præd. cum conditione præd. contra legem terræ hujus regni Angliæ exiſtent. facere ſe conceſſit. qua quidem occaſione et non alia præd.* THOMAS CLARKE *præd. decimo ſeptimo die Octob. anno regni dict. domini regis nunc triceſimo primo ſuprad. apud civitat.* EXON *præd. in com. ejuſdem civitat. præd. ſcript. præd. cum conditione præd. præd. gubernator. et guardianis fraternitat. ſciſſor. præd. fecit et ſigillavit, ac iidem gubernator et guardiani fraternitat. ſciſſor. præd. indebite et contra legem terræ hujus regni Angliæ ac ad impediend. reſtringend. et deprivand. præd.* THOMAM CLARKE *ab exercitio uſu et occupatione in eadem civitat. præd. artis myſterii et facultatis ſciſſor. indebite et contra legem hujus regni Angliæ præd. ſcript. colore præmiſſor. et colore officii ſui præd. de præd.* THOMA CLARKE, *adtunc et ibidem, exegerunt habuerunt et receperunt, ſicque ſcript. præd. cum conditione præd. in forma præd. et ex cauſa præd. ut prefertur capt. et exact. ratione præmiſſor. vacuum et nullius vigoris in lege devenit et exiſtit et hoc idem* THOMAS *paratus eſt verificare unde petit judic. ſi ipſe idem* THOMAS *de debito præd. virtute ſcripti præd. onerari debeat.*

JOHN TREMAYNE.

Et præd. gubernator et guardiani fraternitat. ſciſſorum præd. dicunt quod ipſi per aliqua per præd. THOMAM CLARKE *ſuperius placitando*

tando allegat. ab actione ſua habend. præcludi non debent, quia dicunt quod præd. THOMAS *decimo ſeptimo die Octobris anno triceſimo primo ſuprad. apud civitatem* EXON *præd. in com. ejuſdem civitatis ſcriptum obligatorium * præd. ſigillavit et ut factum ſuum deliberavit modo et forma prout præd. gubernator et guardiani fraternitat. præd. ſuperius verſus eum narraverunt, et hoc parat. ſunt verificare: Unde petunt judicium et debitum ſuum præd. unacum damnis ſuis occaſione detentionis debiti illius ſibi adjudicari,* &c.

* [349]

FRANCIS PEMBERTON.

Et præd. THOMAS *dicit. quod placitum præd. per ipſos gubernator. et guardian. fraternitat. ſciſſor. ſuperius replicando placitat. materiaque in eadem content. minus ſufficient. in lege exiſt. ad ipſos gubernator. et gardian. fraternitatis ſciſſor. præd. actionem ſuam præd. verſus eum habend. manutenend. ad quod quidem placitum ipſe idem* THOMAS *neceſſe non habet nec per legem terræ tenetur aliquo modo reſpondere. Et hoc paratus eſt verificare: Unde pro defectu ſufficien. replicationis in hac parte idem* THOMAS *petit judic. et quod præfat. gubernator et gardian. ſciſſor. ab actione ſua præd. verſus eum habend. præcludantur,* &c.

JOHN TREMAINE.

Et præd. gubernator et gardian. fraternitat. ſciſſor. dicunt quod placitum prædict. ſuperius replicando placitat. materiaque in eodem content bon. et ſufficien. in lege exiſtunt ad ipſos præd. gubernatorem et gardian. fraternitat. ſciſſor. actionem ſuam præd. verſus præfat. THOMAM *habend. manutenend. quod quidem placitum ipſi iidem gubernator et gardiani fraternitat. ſciſſorum parati ſunt verificare et probare prout cur', &c. Et quia præd.* THOMAS *ad placitum illud non reſpond. nec ill. hucuſq; aliqualit. dedicit (ut prius pet. judic. et debitum ſuum præd. unacum damnis ſuis occaſione detentionis debiti ill. ſibi adjudicari, &c. ſed quia cur. dom. regis nunc hic de judicio ſuo de et ſuper præmiſſis reddend. nondum adviſatur dies inde dat. eſt partibus præd. coram dom. rege apud Weſtm. uſque diem Mercur. proxim. poſt, &c. de judicio ſuo de et ſuper præmiſſis audiend. et quia cur. dict. domini regis nunc hic inde nondum adviſatur dies inde dat. eſt,* &c.

THE CASE.

DEBT UPON A BOND for forty pounds, brought by the *company of taylors* in *Exeter*, againſt *Clarke*, who craves *oyer* of the condition, which is, "that if he pay twenty pounds within a month "after he ſhall uſe the trade of a taylor in *Exeter*, otherwiſe than as "as journeyman, and if he leave the town on forty days notice, then "the obligation to be void."

A bond conditioned to pay to a corporation a penalty on ſetting up the trade of a taylor in the city, or otherwiſe working at the ſaid trade, in the ſaid city,

He pleads that the plaintiffs, pretending to be A CORPORATION,

than as a journeyman, is void, as being in reſtraint of trade. ——— 1 Peer Wms. 181. 2 Skin. 739. 5 Term Rep. 119.

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and to have the ſole uſe of that trade there, excluſive of all others not free of their company, did trouble and vex him in the lawful uſe of his trade of *a taylor*, in which he had been bred and was ſkilled, till he gave that bond for his eaſe and deliverance, and that the ſaid bond was given on that occaſion, and not any other; and that the plaintiffs took it to reſtrain and deprive him of his ſaid trade; which bond ſo taken *indebite et contra legem, vacuum et nullius vigoris devenit et exiſtit.*

The plaintiffs reply, that it was delivered *modo et forma* as they have declared.

The defendant demurs.

TREMAIN argued, that the bond was void, being in reſtraint of trade, and urged the ſaying of HULL in the reign of *Henry the Fifth*, and the caſe of *Cleigate v. Batchelour*, and ſeveral others, which, becauſe they are anſwered in the argument made on the other ſide, I ſhall not recite.

I ARGUED *for the plaintiffs* to this effect, *viz.* that this bond is good: for FIRST, a bond, though with a condition reſtraining trade, is not void, if only from a particular place: it muſt be agreed, that if the condition be ſuch as either binds the obligor to do ſome unlawful act to excuſe himſelf from the penalty, or defends the obligee in doing an ill thing, in either of theſe caſes, both the condition and the obligation will be void; but my LORD COKE (*a*) ſays, it muſt be a *malum in ſe*, which is in itſelf naturally unlawful, and cannot, by any law, be made lawful; and all the bonds that are adjudged void at common law for their conditions ſake are ſuch, (bonds to ſheriffs, and upon uſurious contracts are void by ſtatute-law). They are all to do ſuch unlawful acts as occaſion a manifeſt prejudice to the public, or a plain injury to ſome third perſon. Now our caſe comes within neither of theſe, for the exerciſe of a trade in a particular place is at moſt but a privilege or liberty which the common law gave to every man that had ſkill to uſe it; and ſince 5 *Eliz. c.* 4. to all that have ſerved ſeven years apprenticeſhip, they being then preſumed to have
* [351] ſkill. * No man is bound to uſe his trade in a particular place, nor is any man puniſhable for not doing ſo, and whatſoever he may lawfully forbear that he may oblige himſelf againſt; for the matter of the condition being antecedently lawful, how a voluntary obligation ſhould make it otherwiſe ſeems ſtrange. *Quilibet renunciare poteſt juri pro ſe introducto*, is a certain rule, and infallibly true in all caſes, except where a third perſon is wronged, or the public prejudiced by ſuch act; neither of which is in our caſe: the former is no way concerned herein, nor the latter, as our caſe is. It is true, trade in general is *pro bono publico*, but whether the defendant be a taylor at *Exeter* or *Tiverton* is no matter: every man is bound to work, that has no other means of livelihood, and, ſince 5 *Eliz. c.* 4, in the trade he was bred in as an apprentice becauſe he can uſe no

(*a*) Co. Lit. 206.

other;

other; therefore a reſtraint of all trades would be void, and ſo a reſtraint of one trade from all places in the nation, becauſe the public would be prejudiced, becauſe a trader would be loſt; for that perſon perhaps either ought not, or ſkills not how to uſe any other; but otherwiſe if from one place only, becauſe the kingdom may be as well ſerved by him in another place as in that one. It being a right or privilege, and not a duty, *beneficium* not *officium*, to uſe his trade in *Exeter* may be waived or relinquiſhed; and it is a rule applicable to this caſe, *modus et conventio vicunt legem:* many things are good by conſent which are not by compulſion; and therefore bye-laws many times bind thoſe that are parties to the making of them, as members of a corporation and the like, which no ways oblige ſtrangers; and therefore a bye-law that none but thoſe of their company ſhall uſe that trade may be void, becauſe it takes away this right or liberty of trade, and againſt their wills; and this is the true reaſon of the many caſes concerning the invalidity of ſuch bye-laws: and particularly of the *Taylor of Ipſwich's caſe* (*b*), this very reaſon is alledged, and the difference aſſigned between a man's own engagement, and a conſtraint by bye-laws not to uſe his trade in a particular place: ſo in the caſe of * *Joliff v. Broad* (*c*), which I ſhall make more uſe of preſently: and this is the true reaſon of the preſcriptions and cuſtoms for the ſole uſe of a trade in a particular place, excluſive of others, as ſole baking of bread, grinding of corn, &c. (*d*), becauſe ſuppoſed to have in its original a reaſonable commencement by conſent and agreement. Not to plough a man's ground, ſome of *the Year-books* ſay, would be a void covenant or obligation; and yet if a leſſee for years of a farm ſhould covenant not to plough his land the laſt year of his term, this doubtleſs would bind him, and is very uſual, and yet huſbandry is certainly as much for the public good of the kingdom, as any particular trade, whether that of a taylor or any other; ſo that by an obligation or contract a man may lay a partial reſtraint on himſelf. Our law takes notice in many caſes of a difference between a total and a partial reſtraint of perſons from things that are really *pro bono*; and therefore when a man gives or deviſes any intereſt, with a condition not to marry, the donee ſhall have the full benefit of the gift, as if no ſuch condition were annexed thereto; but yet a condition not to marry any of ſuch a town would be good. In reaſon there is and muſt be a difference between a total and a partial reſtraint of a man's trade: one reaſon why a total reſtraint is againſt law is, becauſe the man is thereby tempted, nay, under ſome neceſſity to be idle, and ſo the kingdom would loſe the benefit of his labour; but what need he be idle who has all *England* to work in ſave ten acres of ground called *Exeter*? Nay, how can it be termed a reſtraint when he has liberty for it throughout the whole nation, any where ſave one town? A man may by articles, by covenant, or by bond, oblige himſelf to abide and trade in a particular place, and if he may be obliged to that, then ſurely *e contra*; for an engagement to reſide and trade in one

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(*b*) 11 Co. 53. and in 1 Roll Abr. 16.
(*c*) 2 Roll. Rep. 201. Cro. Jac. 569.
(*d*) See Sir George Farmer's caſe, cited 8 Co. 125.

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place is an implicit reſtraint as to all other, and it is more like an impriſonment than any thing, and yet it is frequently done upon marriages in particular families of another place, different from * that the party was born in; and for trades, it is common and uſual for merchants, factors, and mariners, going in the *Eaſt India* Company's ſervice, to bind themſelves, not to trade there upon their own account; and yet it was never queſtioned but that ſuch articles and bonds are obligatory, becauſe reſtrictive only to a particular place, and yet merchandizing is for the weal-public, as much as a manual occupation. Here in the caſe of the *Eaſt India Company v. Sands* (*e*) in THE ADMIRALTY, it was not doubted but that if *Sands* had given bond or caution not to trade in *the Eaſt Indies*, it would have been obligatory; nay, it was agreed; otherwiſe there would never have been ſo much diſpute about the ſtaying his ſhip till ſuch bonds given, if they would have been of no force when given. A mariner may doubtleſs oblige himſelf not to go any voyages to particular places. Commiſſioners of the cuſtom-houſe are obliged not to merchandize, and yet ſeveral of them have been educated merchants. Here in *London* what are more ordinary than covenants in leaſes, and bonds for performance of them, "that the leſſee his executors, adminiſtrators, nor "aſſigns, &c. ſhall not uſe ſuch and ſuch a trade in their houſes," and yet never pretended to be againſt the law; and though in ſuch caſe the particular leſſee be not of the trade ſpecified in the covenant, yet his executors or aſſigns may be ſo, and there is no danger of the covenant's being broke, unleſs it be by one of that particular trade. The true reaſon of the opinions that bonds which oblige to an abſolute forbearance of trade are void, is, becauſe they deprive a man of his way of living, which reaſon fails in this caſe, becauſe it is only to *Exeter*, and no other place, and he has every where elſe beſides left him to get a livelihood in. But beſides the reaſon of the thing, authorities are not wanting, and expreſs ones too; the caſe of *Joliff v. Broad* (*f*) is ſo notable a caſe that all the reporters of that age take notice of it; it was an action on the caſe on a promiſe to pay an hundred pounds on the uſing of * trade, and it was directly adjudged, that an *aſſumpſit* will lie on a promiſe not to uſe a man's trade in a particular town, but that a general promiſe not to uſe it at all is void; and the reaſon given for the judgment is this very difference; and as the caſe is in *Rolle's Reports*, the LORD MOUNTAGUE ſays, that a tradeſman may bind himſelf not to trade or dwell in *Fleet Street*, but *Cheapſide*; and they all agree to it: And that is certainly the ſame, as to this purpoſe, with two diſtinct towns, and there they ſay it is no reſtraint againſt law, becauſe he has ſtill liberty to inhabit and trade in any other place within the kingdom. And this judgment in the Common Pleas was afterwards affirmed on ſolemn argument again in the King's Bench. It is true this was an *aſſumpſit*, and ours is *a bond*, but I hope to evince them to be the ſame preſently: the reaſon given for this judgment in *Jones's Reports* is, becauſe with a man's own conſent he may part with his right of trading in any

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(*e*) Poſt, 366.
(*f*) 2 Roll Rep. 201. S. C. Noy, 98. S. C. 1 Jones, 13. S. C. Cro. Jac. 569, S. C. 1 Roll Abr. 16.

particular

particular place, *volenti non fit injuria*; and, as it is reported in *Noy*, the reaſon given is, becauſe reſtrained from one place only, otherwiſe if it had been a general reſtraint ſays that book; all which reaſons of that judgment reach our caſe. Another ſuch caſe in every particular is that of *Bragg v. Tanner* (*g*), it is caſe on an *aſſumpſit*, wherein the plaintiff having bought the defendant's ſhop and goods in *Newgate Market*, the defendant in conſideration thereof promiſed, that if he ever after uſed that trade in *Newgate Market*, he would pay to the plaintiff a hundred pounds; and this was adjudged a good *aſſumpſit*. Another like caſe is that of *Prugnel v. Goffe* (*h*), it is an *aſſumpſit*, that in caſe the plaintiff would marry the defendant's daughter, the defendant promiſed ſhe would aſſign over her ſhop and goods in *Baſingſtoke* to the plaintiff, and not exerciſe her trade in that place; and for that ſhe ſtill uſed the trade there, it was adjudged for the plaintiff in the court of Common Pleas, and that judgment was affirmed on a writ of error in this Court. And in that caſe of *Prugnel v. Goffe*, my LORD ROLLE aſſigns this very difference, and ſays, that though the conſideration be never ſo good, yet if the reſtraint * be general throughout *England*, either a bond or an *aſſumpſit* would be void; otherwiſe if ſuch reſtraint be only particular, as here, which argues there is no difference between an *aſſumpſit* and a bond, as I ſhall prove preſently, and I hope very plain. Another like caſe there is in *March's Rep.* 77. *caſe* 121. where a contract being between two mercers, that the one ſhould buy of the other all his mercery wares, and take his ſhop of him; the other in conſideration thereof promiſed not to ſet up his trade in the ſame town, and adjudged a good *aſſumpſit* in the court of King's Bench.

* [355]

Now ſome opinions ſeem to make a difference between *a bond* and *a promiſe*: as to this purpoſe, MY LORD, there can be nothing pretended to diſtinguiſh them, but either *the conſideration* or *the obligation*.

FIRST. The conſideration can never make any variance, for firſt, we are in a court of law, where every bond has a good conſideration as ſtrongly implied as an *aſſumpſit* muſt have one expreſſed; beſides, a good conſideration can never make an ill promiſe good, where the matter of the promiſe is ſo, and this is adjudged in *Onely's caſe*, *Dyer*, 355. Every debt implies a promiſe, and *in fact* is a good conſideration: and therefore is it that an *aſſumpſit* lies upon an *indebitatus*: nay, an *aſſumpſit* will lie on the conſideration of a man's being indebted by bond, and there is no one caſe in the world where, at the common law, a bond is void becauſe of the illegality of the condition, but an *aſſumpſit* to do that unlawful thing would be void too, though the conſideration be never ſo good; and if we put the particular caſes commonly inſtanced in, it will plainly appear; as to kill J. S.; to beat J. N.; not to go to church; and ſo of all the other.

(*g*) Palm. 172. (*h*) Allen, 67. S. C. Stiles, 11.

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SECONDLY. The lien or obligatory nature of the one, and the other are the same in kind, though not in degree: a parol contract and an obligation are of the same nature, only one by deed, the other not; and there is no other difference. The penalty cannot alter the case, save a little more effectually to oblige to the performance: nay, a promise to pay so much money * on doing or not doing such a thing is the same, and so are the cases I have cited; and ours is nothing but such a promise under seal and in writing; so that I cannot imagine but wheresoever the condition of a bond is against law, and void, a covenant or promise for the same matter must be so too; *et e contra*: and now it being agreed that such *a promise* is good, as it must be on this multitude of evidence, our *bond* must be so too; yea, ours seems stronger, for in a single promise the *assumpsit* is directly and expressly binding not to use his trade, and here the direct and express, and immediate obligation is only to pay forty pounds, and the condition is in nature subsequent to the obligation, and comes by way of defeasance for the obligor's benefit, and not for ours. I confess I have never a case in a bond but one, which is *Barrow v. Wood* (*i*), and there the better opinion is for the plaintiff, though there be no judgment but only an *adjournatur*, and therefore I suppose the defendant compounded the matter.

* [356]

There is one thing more which will go a great way in this case perhaps: a taylor's trade is doubtless within 5 *Eliz. c.* 4.; and they have not pleaded that he had been seven years apprentice to that trade; so by that law it is unlawful for him to use that trade; now it cannot be deemed to be against the laws of this kingdom of *England*, for a man to oblige himself not to do that which the law had before forbid under a penalty: and to avoid a bond you will never intend that he was so, whatsoever you would to make a bond good; nay, I hope you will rather intend the contrary.

As to what has been urged on the other side, the strongest objection that has been made is this, that if a man may, under a penalty, restrain himself from one place, he may from twenty, and so from every where. But I answer, that is no consequence, a man is not obliged to use his trade in any particular town, but somewhere he must; and the common-weal is not concerned where it is, so that it be used somewhere; and the reason of a total restraint being against law is, as I said before, because thereby the * kingdom loses an artificer, or an handicraft man; not so here. For the books there is no semblance of law against it till 2 *Hen.* 5. *pl.* 5. and that is the ground of all the scruples ever since, and that it was the single opinion of HULL, who swore *per Dieu* he would commit the plaintiff were he present; but that case was of a general restraint as to all places, and yet in that very case issue was afterwards joined whether he had used the craft of *a dyer* within the time expressed in the condition? which plainly shews that if he had used it, it had been forfeited: then there is the *case of a blacksmith* of *Southmims*,

* [357]

(*i*) March, 191. case 238.

2 *Lev.*

2 *Leon.* 210. where it is ſaid, that ſuch bond is void; but that is an extrajudicial opinion, for it was not the point in judgment then before them; for the matter then was only upon a *habeas corpus* brought by ſuch an obligee, committed by a lawyer, juſtice of the peace, who having read this caſe of 2 *Hen.* 5. *pl.* 5. did what HULL ſwore he would have done, and committed the poor man; but the then court of Common Pleas thought fit to reprimand the juſtice, and diſcharged the priſoner: the ſame caſe is in *Moor*, 142. But then there is another caſe in *Moor*, 115. an *anonymous caſe*, which I can find no where elſe; it is very briefly and oddly reported as if by hear-ſay, for it ſays only, that a maſter takes an obligation of his apprentice not to uſe his trade, &c. and held no action was maintainable on it, but ſays not why or wherefore; ſo that it might be for dureſs, or infancy, or any other cauſe for ought appears in that caſe. Then there is the caſe of *Colgate* or *Cleigate v. Batchelor*, which is in *Cro. Jac.* 872. and in *Owen*, 143. which ſeems the ſtrongeſt of them all, the condition being, that if he ſhall not uſe the trade of a *haberdaſher*, as ſervant, apprentice, or maſter, in *Kent*, *Canterbury*, or *Rocheſter*; and whether this caſe be law I muſt ſubmit to your lordſhips on what I have ſaid before; and in the very caſe there are ſeveral very odd circumſtances. FIRST, It is againſt his being an apprentice, which to debar youth from is a breach of the duty owing to the weal-public. SECONDLY, * It is a reſtraint from ſeveral places. THIRDLY, It appears by the very caſe that he had not been an apprentice, for otherwiſe it is idle to oblige him not to be. FOURTHLY, It is no compulſion on the party, but a bond of the father's not to breed his ſon; ſo that either it is not law, or elſe, if it be, it comes not near our caſe.

* [358]

But, SECONDLY, ſuppoſing a bond in reſtraint of trade to be void, yet ours is ſomewhat different, it being a pure debt of twenty pounds, which he has bound himſelf in the ſum of forty pounds, to pay in a month after the ſetting up his trade in *Exeter*; and this is every day done, and no more againſt law than bonds to pay money on the day of marriage, or birth of a child; it denotes only the time of payment.

THIRDLY, Suppoſing ours ſhould be conſtrued in reſtraint of trade, that part of the condition only which concerns it ſhall be void, and there being another part of the condition lawful, the bond ſtands good; for he ought to perform that; and ſurely it is as lawful for a man to remove and change the place of his abode, and to oblige himſelf to do ſo, as to go to *Rome*, or the like; and the defendant having given no anſwer to this part of the condition, the plaintiff ought to have his judgment, *Norton v. Symms*, *Hob.* 14. *Moor*, 856.

Upon all which I prayed JUDGMENT *for the plaintiff*, principally on the firſt point, for that the condition, reaching only to a particular place, would not vacate the bond as a total reſtraint might.

And of this opinion was THE WHOLE COURT upon the firſt argument, for this reaſon, that a man might part with his own privilege

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by his own conſent, where it is no way to the prejudice of the public, as in this caſe it is not, for *he may uſe* his trade any where elſe.

And JEFFERIES *Chief Juſtice*, inſiſted much on the common practice of covenants of this nature in *London*, and we had a rule for judgment, unleſs better cauſe before the end of the term.

But the laſt day of the term, MR. JUSTICE HOLLOWAY being there alone *,

* [359]

Rule for judgment enlarged till the enſuing term.

MR. TREMAINE moved to ſtay judgment on another exception, *viz.* becauſe we had not ſet forth a breach of the condition of the bond in our replication, and ſo there was no cauſe of action appeared on the whole record; and therefore we ought not to have our judgment.

In anſwer to which I URGED that their plea had confeſſed it, they having pleaded that the bond was void, and ſo they were not obliged to pay it; beſides, the firſt fault was in their bar, and our count was good.

However, MR. JUSTICE HOLLOWAY, ſaying nothing to the exception, told me it could do no harm to ſtay judgment till next term.

And accordingly the rule for judgment was enlarged to the firſt day of the next term.

In an action of debt on bond, if THE PLEA admits and ſuppoſes a non-performance, A REPLICATION is good, although it do not alledge a breach of the condition.

MR. POLLEXFEN, on the firſt day of *Trinity term*, moved for the defendant on the ſame exception that TREMAINE ſtarted laſt term, and inſiſted on this, that we ought to have demurred, or ſhewn a breach in our replication, and cited the caſe of an award in *Hob.* 199. where the defendant pleading *nul award*, the plaintiff replies and ſets forth an award, and held naught, becauſe he did not lay any breach, and ſo on the whole record no cauſe of action appeared to the Court; and cited likewiſe the caſe of *Heyman v. Gerard* (*k*) ſuch a like caſe.

TREMAINE repeated the ſame things, adding likewiſe a citation of *Dr. Bonham's caſe* (*l*), but to what purpoſe I know not.

To which exception, being afore prepared, I anſwered thus:—That *the bar* being ill the plaintiff ought to have judgment be *the replication* never ſo idle, and that for theſe two reaſons, or rather differences, which would anſwer all that has been ſaid or can be urged on the other ſide.

See 6 Mod. 4.

FIRST, Whereſoever the bar is ill in ſubſtance, and the matter contained in it, were it well pleaded, is inſufficient to preclude the plaintiff from his action, there, though the replication be naught, yet judgment ought to be for the plaintiff. It is true, in *Dr. Bonham's caſe* it is there reſolved, that where by the plaintiff's replica-

(*k*) Michaelmas Term, 19 Car. 2. (*l*) 8 Co. 107.

tion

tion it appears the plaintiff has no cauſe of action, there he ſhall not have judgment, though the bar be ill; but when the bar is inſufficient in matter, or amounts to a confeſſion of the point of action, * and the plaintiff replies and ſhews the truth of the matter to inforce his caſe, and in judgment of law ſuch replication be immaterial and idle, yet the plaintiff ſhall have his judgment, for when the count wants ſubſtance no bar can make it good; ſo where the bar wants ſubſtance, it cannot be made good by a faulty replication. So is *Dr. Bonham's caſe*, and the ſame reſolution is in *Meriel Treſham's caſe* (*m*), where it is adjudged, that if the bar be inſufficient in matter, and the count be good, although the replication be ſuperfluous, provided it contain no matter which impugns or deſtroys the plaintiff's action, though immaterial, yet the plaintiff ſhall have his judgment; and ſo is *Turner's caſe* (*n*).

* [360]

SECONDLY, Whereſoever the bar contains matter collateral to, or *dehors* the condition, in avoidance of the whole action, or whereſoever any ſpecial, ſingle, particular thing is pleaded, though it be ſpecified in the condition, in theſe two caſes, we need not make an aſſignment of any breach of the condition in our replication; for any matter pleaded that would avoid the bond, or tends to avoid it *ab initio*, if ſuch bar be ill, the plaintiff ought to have his judgment be his replication what it will; becauſe all ſuch kind of pleas do by implication agree a non-performance of the condition. For ſuppoſe a man ſhould plead *dureſs*, and not rightly, and the plaintiff reply to that ſingle matter of *dureſs* as he ought, he need not aſſign a breach of the condition, for the very plea, being perfectly a collateral matter, is *quaſi* a confeſſion of the point of action; for no man ſhall be intended to have performed the condition of a bond, which he ſays was extorted from him by *dureſs*. So in our caſe, how can it be imagined that the defendant has performed this condition when he himſelf conceives it void and of no force in law? Nay, every man in pleading is preſumed to make the beſt of his own caſe; and ſure could he have done it with truth, he would have pleaded a performance. The reaſon they inſiſt on is, that there ought to appear to the court cauſe of action. * I anſwer, ſuppoſe *dureſs* pleaded to debt on a bond, and the plaintiff reply, in maintenance of his count, with a traverſe of the dureſs, and iſſue is joined on this, and it be found for the plaintiff, ſhall not he have judgment? Yes certainly, and yet no breach aſſigned. But here it may be ſaid, there is no *oyer* craved of the condition, or becauſe it is ſingle. I anſwer, dureſs may be pleaded after *oyer* of the condition, and then it does all appear to the court. But I will put a caſe where *oyer* muſt be of the condition, as in caſe the *ſtatute of uſury* be pleaded, and the plaintiff replies; he needs not, nor ever does he aſſign a breach in his replication, becauſe the very plea imports a non-performance. Of all the ſheriffs bonds where the ſtatute has been pleaded to them, never was a breach aſſigned in the replication. The ſame of raſure, interlineation, or other ſpecial *non eſt factum* pleaded,

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(*m*) 9 Co. 110. (*n*) 8 Co. 133.

ſo

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so of infancy or the like, or a release pleaded. So if a special single matter be pleaded, as no demand, no notice, or the like. In the case of *Griffith v. Spencer* (*o*), debt on a bond was brought in the Common Pleas, and *oyer* craved of the condition, which was to pay a hundred pounds, after notice of the plaintiff's return to *England* from *Constantinople*; the defendant pleads no notice; the plaintiff replies notice in such a manner, &c.; hereon at last there is a judgment in the Common Pleas for the plaintiff; and the defendant bringing a writ of error here in this Court, insists upon this very matter for error, that no cause of action appeared, no breach being assigned of the non-payment: and the judgment was affirmed on this very difference; it being a single, special, collateral matter pleaded, which was a kind of admission that the money was not paid. There are but two cases that can be pretended to go otherwise, and those are bonds for performance of awards, and the like for covenants; as *Waters v. Bridge* (*p*), and *Barret v. Fletcher* (*q*). That was in case of a bond of submission, the reason there assigned for such exception was, because the pleas in bar were to the matter in the condition; as "no "award," "performance of covenants," and the like, * which pleas cannot be well avoided without setting forth the whole matter, and assigning a particular breach; otherwise where they plead a particular collateral matter, as outlawry, or the like, which must be answered, or any other special matter, there no breach need be assigned; but when the defendant's plea is in the generalty, the plaintiff ought to shew his cause and a breach. In the case of *Jeffry v. Guy* (*r*), debt on a bond for performance of covenants in a lease; the defendant pleads an eviction by the entry of a stranger having a prior title; the plaintiff in his replication traverses the entry of the stranger, &c.; non-assignment of a breach was afterwards assigned for error, because the defendant pleading a special matter disabled the plaintiff from assigning a breach, for of necessity he ought to answer the special matter alledged in the bar: and another like case in *Bayly v. Taylor* (*s*), and the same rule for the same reason. It is ruled likewise, that whersoever the replication is not to entitle the plaintiff to his action, but only to avoid the bar, which bar is ill, there judgment shall be for the plaintiff, though the replication be superfluous, or otherwise naughty; and so it is adjudged in the case of *Gewen v. Roll et ux'*, executrix of one *Noble* (*t*), debt on a bond of a thousand marks; the defendant pleads a statute with a defeazance for performance of covenants, which bar is ill, because it does not say the statute was forfeited; the plaintiff does not demur, but replies a fraud, and that ill too; so here was both bar and replication ill; and this exception taken because no breach assigned in the non-payment of a thousand marks; and after divers motions judgment was given for the plaintiff for this very reason. As to the case of *Heyman v. Gerard* (*u*), LORD SAUNDERS, though of counsel with the defendant, was of opinion against the exception; besides, there is no

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1 Lev. 226.

(*o*) Cro. Eliz. 320.
(*p*) Cro. Jac. 640.
(*q*) Cro. Jac. 221.
(*r*) Yelv. 78.
(*s*) Yelv. 24.
(*t*) Cro. Jac. 133.
(*u*) 1 Saund. 102. S. C. 1 Sid. 340. S. C. 2 Keb. 258. 275.

judgment

judgment in the cause, for the suit was ended by reference. * As to that case of *Hob.* 199. there is a plea in the generalty, viz. *nul agard fait*; and as for the case of *Norton v. Simmes* (x), (which is a much more pertinent case, and more pregnant of the objection than any cited by TREMAINE on the other side) the plea was "performance" generally, which though an ill plea, some of the covenants being negative, yet it was in the generalty, and not collateral, nor any single special matter, and so contradicts not either of the differences I have assigned. As for *Hamond v. Dodd* (y), the bar is adjudged good, being certain to a common intent, and so nothing to the purpose: As for *Ridgway's case* (z), debt on an escape, the reason why judgment is there for the defendant was, because, on the plaintiff's own shewing in his replication, it appeared he had no cause of action, that there was no escape; for the defendant pleading a fresh pursuit and a recaption, the plaintiff replies and denies not the fresh pursuit, but pleads that the party was out of his sight; which might be, and yet the plaintiff excusable from an escape; and as the case is reported in *Poph.* 41, 42. the reason is given because it was ill in form only, of which, after a replication made, there being no demurrer to it, the plaintiff shall take no advantage, and then the first fault is in the replication; and where the bar is insufficient in substance, and the matter or cause of action alledged in the count is not sufficiently avoided by the bar, judgment shall be for the plaintiff; and in that case the matter pleaded in bar, if it had been well pleaded, would have been a good bar, *viz.* fresh pursuit, and so the fault was only in form, and by consequence helped by the replication; but had it been an ill bar in substance it would have been otherwise: and all the cases they have or can cite, are either in the generalty or good in substance, or to the matter of the condition; as "*nul tiel award*, performance of covenants, or award," they are all good in substance, and so not within either of my three differences which I insist on: as

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FIRST, * Wheresoever the matter pleaded in bar is collateral to, or *dehors* the condition of the bond, there needs no assignment of a breach; and though we do not demur, but make a superfluous, idle replication, we ought to have judgment if such bar be ill.

* [364]

SECONDLY, Wheresoever the bar is insufficient in substance or matter to exclude the plaintiff of his action: or

THIRDLY, Wheresoever the plea in bar is to, and of, some special, single, particular matter, though it be contained in the condition, if it be ill, it is with the plaintiff, though he do neither demur nor assign a breach, but makes an idle replication.

And therefore I pray judgment for the plaintiff.

THE COURT were all of opinion for the plaintiff, for that the

(x) Hob. 14. S. C. Moor, 856. (z) 3 Co. 52.
(y) Cro. Car. 3.

matter

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matter pleaded in bar is merely idle and collateral, and admits a non-performance as much as a releaſe.

THE LORD CHIEF JUSTICE put this caſe to MR. POLLEXFEN, Suppoſe a defendant ſhould plead to debt on a bond, that the plaintiff diſcharged him of that, and ſhews not how, and the plaintiff replies ſome matter immaterial, ſhall not he have judgment becauſe he has not aſſigned a breach?

And judgment was given for the plaintiff by THE WHOLE COURT WYTHENS *abſente*.

POLLEXFEN and TREMAINE for the defendant, SHOWER for the plaintiff.

However, TREMAINE not being ſatisfied, his client brought a *writ of error*, though as to the laſt point all the bar thought there was nothing in it; (and as to the firſt point I think not much.)

Afterwards, in the Exchequer chamber I ARGUED it again, and there the Court were of opinion with my client as to the laſt point, *viz.* that the replication was well enough without alledging a breach, becauſe the plea admitted and ſuppoſed a non-performance.

But as to the firſt they held the bond void, being a reſtraint of trade, and held the difference between a bond and *aſſumpſit*, becauſe of the conſideration, without any regard to the conſideration implied in law, upon ſealing and executing of the bond.

And ſo THE JUDGMENT was reverſed.

Trinity

The Thirty-ſixth of Charles the Second,

IN

THE KING's BENCH.

Sir GEORGE JEEFERIES, *Knt. Chief Juſtice.*

Sir FRANCIS WYTHENS, *Knt.*
Sir RICHARD HOLLOWAY, *Knt.*
Sir THOMAS WALCOT, *Knt.*
} *Juſtices.*

Sir ROBERT SAWYER, *Knt. Attorney General.*

HEANAGE FINCH, *Eſq. Solicitor General.*

Anonymous. Caſe 350.

NOTA. An action was brought againſt two executors; one appears and pleads "*no aſſets,*" and it was found againſt him; and judgment againſt both, with *coſts* only againſt him that appeared and pleaded. *Quære* if good.

Coſts againſt one of two executor defendants. Hard. 165. Bull. N. P. 332.

1 Roll Abr. 933. Cro. Car. 226. Hullock's Law of Coſts, 196.

The Mayor of Berwick's Caſe. Caſe 351.

BERWICK *upon Tweed* is not within any county; has no ſheriffs; the mayor there makes, executes and returns all proceſs; and generally their ſuits there are commenced and ended in their own courts; but in a cauſe of land there, if commenced here, there is a *ſuggeſtion* made on THE ROLL, that *breve domini regis ibi non currit*; as it is in *Wales:* and on this reaſon *an attachment* could not be granted againſt THE MAYOR, becauſe no ſheriff to execute it; but a tipſtaff was ſent.

The king's writs do not run into *Berwick*, for it is not within any county in *England.* 2 Burr. 836.

The

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argued for the plaintiff to this effect: if theſe letters patents be binding, I ſhall not contend nor argue, but that the king may, notwithſtanding theſe letters patents, licence others to trade there likewiſe: FIRST, Conſider how trade was at the common law; trade is either inland or foreign. Inland trade conſiſts of manufacture or merchandize; for the firſt any man may at the common law uſe it how and when he pleaſes, ſo as he do not annoy his neighbours, and the king's prerogative is not concerned: as for merchandize, generally ſpeaking, a man might buy and ſell as he pleaſed, but firſt at common law no man could ingroſs one commodity.—SECONDLY, This was reſtrained to particular places (*e*). Then, THIRDLY, No aſſemblies could be had for trade without the king's licence. Though ſome fairs and markets are by preſcription, yet their original is from the crown, and theſe licences for trading in aſſemblies, as in fairs and markets, cannot be reſumed without ſome forfeiture, and in theſe all the king's ſubjects have an intereſt; and the lord of a market cannot prohibit them; and in theſe the public is concerned to prevent cheats and puniſh diſorders, and therefore a court of juſtice is incident to ſuch fairs.—FOURTHLY, There was another reſtriction of *foreign bought* and *foreign ſold*, which prevailed in ſeveral cities, towns, and ſea-ports (*f*). So that the managery * of the principal part of inland trade in markets and fairs was under the king and his influence.

27 Viner's Abr. 202.

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SECONDLY, As to foreign trade, the common law takes notice but of two ſorts of foreigners, *friends* and *enemies*, and that muſt be tried by the leagues of peace and war, which are, or ought to be inrolled in Chancery: although there be no actual war, yet if there be no league, they may take up arms and fight one another, for they are *in ſtatu belli*. At common law no man had a right to trade with ſtrangers (*g*). The laws of commerce are contained in the leagues of princes and people; all ſtrangers that came hither came under ſafe conduct, and the king might have prohibited them: MAGNA CHARTA (*h*), which is a general ſafe conduct to ſtrangers, has a reſtriction *niſi ſit publice prohibitum*: COKE argues, that before that time the king did prohibit them; but he interprets this to be a prohibition in parliament, which is a conſtruction as without authority, ſo againſt all precedent: the king may order them to depart the realm (*i*). By the 27 *Edw.* 3. *c.* . the king may prohibit ſtrangers from coming hither, he may prohibit his ſubjects from going thither. "Noted and notable merchants" were certainly meant "merchants of the ſtaple" (*k*); merchants adventurers, and merchants of the ſtaple: then as the king may prohibit his ſubjects from going beyond ſea, ſo he might recall them when he pleaſed. From all the caſes (*l*) it is evident, that at common law no man

(*e*) 3 Inſt. 196.
(*f*) See the ſtatute 9 Edw. 3. c. 1. and 9 Edw. 4. N° 30. not printed. 8 Co. 128.
(*g*) Bodin. de Republ. lib. 1. cap. 7.
(*h*) Cap. 30.
(*i*) 2 Inſt. 57. Roll's Prerog. 180.
(*k*) See 1 Eliz. c. 13.
(*l*) Dyer, 128. 276. 375. 3 Inſt. 179. 1 Leon. 9. Year Book, 24 Edw. 3. pl. 13. Knowles v. Lucy, Moor, 109.—See alſo 1 Black. Com. 266. 4 Black. Com. 122. 4 Bac. Abr. 170.

has

has a right to trade abroad (*m*). The law veſts the ſole power of making leagues in the king alone, and never was a league made for a free univerſal unlimited trade (*n*). In all leagues the municipal laws of each realm are excepted: the rules of the common law have no cognizance of ſuch foreign matters, as foreign trade being merely foreign and there tranſacted (*o*). And * it has appointed no rules for the managery thereof, but has left it to the king. The foundations of foreign trade are two.—FIRST, The king's leagues.—SECONDLY, The king's grant either ſingly or in parliament.—FIRST, If a league be broken, let the ſubjects right be what it will, it is gone; for upon breach of the league they become as enemies; and theſe leagues may be limited as to time and place, as was the league between the *King of England* and the *Duke of Burgundy*, againſt *Flanders* and the *Low Countries* (*p*). SECONDLY, The other foundation is royal licences, as the king may, at the common law, prohibit his ſubjects to go beyond the ſeas, ſo he may licence them (*q*). He may licence *alien enemies* who were prohibited by the common law, as by his letters of ſafe conduct (*r*). The ſtaples, which were the public marts, were ſettled all by the king alone, though afterwards ſettled and confirmed by act of parliament (*s*). Wool, woolfels, leather, and lead, were the ſtaple commodities: The king had undoubted right to give licence of trade to other places than where the ſtaple was fixed: the men of *Berwick* and *Newcaſtle* had ſuch licences, but afterwards they being found inconvenient were removed (*t*). It is moſt plain, that the foreign trade and its managery is governed by the prerogative in all caſes where no act of parliament has interpoſed; and in all theſe ancient times the foreign trade was managed by the king's charters to foreigners (*u*). Several *Engliſh* obtained licence to fiſh in the ſea with veſſels of thirty tons; and this was within the narrow ſeas (*x*). Then there are royal licences by act of parliament, but there are far more laws for reſtraint of trade by *Engliſh*, than there are for open trade: there was never a ſtatute yet that gave liberty of * trade to all nations. He urged, that the ſeveral ſpecial ſtatutes for liberty of foreign trade to particular nations, or of particular commodities, are all introductive of a new law; all the acts of parliament which do found licences to trade, do ſuppoſe leagues, for they create no liberty in time of war. When the king has given a liberty or licence, he cannot afterwards make a general prohibition to all people, becauſe there was an intereſt paſſed; nor can he licence all people whatſoever, for that would

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(*m*) There were alſo cited Fitz. N. B. 85. m. Dyer, 165. Grotius de Jure Belli, 3. Year Book, 9 Hen. 4. fo. 4. pl. 15. Cro. Car. 3.

(*n*) 4 Inſt. 153.

(*o*) Dyer, 176.

(*p*) 21 Edw. 3. pl. . 2 Roll Abr. 174.

(*q*) Reg. 193.

(*r*) Year Book, 20 Edw. 4. fo. 6. pl. 6. Moor, 434.

(*s*) 27 Edw. 3. c. 1.

(*t*) Year Book, 2 Rich. 2. pl. 12. 1 Hen. 5. pl. 15. 15 Hen. 6. pl. 13. 5 Edw. 4. pl. 33. Hale's Common Place Book, title "Monopoly," number 3. and the caſe of Shawe, and others, in Hilary, 3 Jac. 1. and Eaſter, 4 Jac. 1.

(*u*) 11 Edw. 3. Rol. Clauſ. 2 part. Membr. 35.

(*x*) Year Book, 3 Hen. 5. pl. . 2 Roll Abr. 170. and a private ſtatute, 5 Eliz. c. .

EAST INDIA COMPANY v. SANDS.

repeal the former; therefore THE CANARY PATENT was void, becauſe expreſsly againſt a former patent. Theſe *Indians* are alien infidels, and they are enemies. Whether trading with them be within the 25 *Edw.* 3. *c.* . I ſhall leave them to conſider. An alien enemy dies ſeiſed, on office found the king ſhall have the land, and not the lord by eſcheat (*y*). If an alien enemy be here before the war begin, his goods cannot be ſeized by any ſubject, but they belong to the king, but if he come here with his goods after the war proclaimed, any man may ſeize them, *ac deveniunt captoris bona:* but as to THE JEWS they are here by an implied licence; but on a proclamation of baniſhment it is like a determination of letters of ſafe conduct to an alien enemy, who was here by virtue of ſuch letters before, &c. There is no league between us and THE GREAT MOGUL, or any of them; and by this charter the *Eaſt India* Company have power to make war and peace with them in defence of their trade: as to the objection of its being void, as in ingroſſing foreign merchandize, and ſo *a monopoly*; that it is not within the ſtatute of monopolies muſt be agreed; and I think there is as little pretence why the ingroſſing of foreign merchandize by a merchant-adventurer, at the common law, ſhould be unlawful. The reſolution of all the judges of *England* was ſo (*z*).

Then SECONDLY, Whether the action will lie? And I conceive it depends on the other point, becauſe if it be a right and a man be injured in it, this action properly lies.

* [372] As to THE * OBJECTION that it is not alledged the defendant had no licence from the king, I anſwer, it is expreſsly ſet forth, that the company have the ſole trading there, and the Court cannot intend that he has any other licence than what he pleads, which is only the ſtatute.

As to THE OBJECTION that the plaintiffs have not ſhewn any ſpecial damage, I anſwer, that need not be in any caſe where the action is founded on the right where a man has the ſole right; it is otherwiſe in caſe of right *a prender*.

As to THE OBJECTION, that the action is grounded only on the excluſive words, which cannot give an action; to that he cited 11 *Co.* 88. *Rolle's Abr.* 96. 196. 106. *numb.* 6.

And the next day MR. POLLEXFEN argued for the defendant.

And the next term THE COURT argued it ſeverally, and did all conclude with the plaintiffs; but I heard them not.

Judgment for the plaintiff (*a*).

(*y*) Co. Lit. 2. See alſo the Year Books, 7 Edw. 4. pl. 17. 22 Edw. 4. pl. 45. Bro. Abr. "Property," 28.

(*z*) Mich. term, 29 & 30 Eliz. 3 Inſt. 96. the Statute 38 Edw. 3. c. 3. 12 Co. 10. Year Book, 23 Edw. 3. pl. 27.

(*a*) The arguments of HOLT, TREBY, FINCH, POLLEXFEN, and SAWYER, are briefly noticed in Skinner, 132. 165. 197. 223. but there is a very full report of the whole caſe, copied from the MSS. of *Samuel Pepys, Eſq.* in 7 vol. State Trials, 494 to 570.

Loveday

Loveday *againſt* Young. Caſe 354.

DEBT on a bond againſt the defendant, as executrix of the laſt will of *John Young*, deceaſed.

In debt on bon againſt the defendant as *executor*, he may plead in abatement that he is *adminiſtrator* and not executor, without traverſing that he adminiſtered as executor; but this plea cannot be pleaded by an EXECUTOR *de ſon tort*.

Cro. Eliz. 102.
1 Roll Abr. 923
Stiles, 337.
Freem. 265.
1 Sid. 76.
1 Keb. 285.
2 Vent. 180. 1 Sa.
Carth. 104.
Andr. 328.
1 Salk. 296.
1 Mod. 239.
5 Mod. 145.
2 Stra. 1106.
5 Com. Dig. "Pleader," (2 D. 4.)
3 Term Rep. 589.

The defendant, before imparlance, pleads in *abatement*, that ſhe was *adminiſtratrix*, and not *executrix*, and that ſhe ought to have been named ſo in the bill, *et hoc parata eſt verificare; unde petit judicium quod billa caſſetur.*

The plaintiff demurs, becauſe ſhe had not traverſed, that ſhe had not adminiſtered as executor.

MR. POWYS *for the defendant* urged, that the plea is good enough, becauſe ſuch traverſe is not neceſſary, for the adminiſtration ſubſequent purges the tort; ſo *Thompſon's Precedents* (*a*), this pleaded in abatement. *Raſtall's Entries* (*b*) is in point, that it may be pleaded in abatement; and need not ſhew the letters of adminiſtration. In *Robinſon's caſe* (*c*) it was pleaded in abatement. The caſe of *Courtney v. Phelps* (*d*), nothing is traverſable but that which is directly and poſitively affirmed in the declaration; but this is only the ſtile of the defendant given him by the declaration: a traverſe in * this caſe perhaps would have been ill, for then it would be concluded that ſhe is executrix of the laſt will, whereas ſhe is EXECUTRIX *de ſon tort* only; and no will in the caſe; and therefore we ought to leave the matter at large, whereon the plaintiff may reply that ſhe is executrix, and traverſe the dying inteſtate, as it is in *Raſtal's Entries* (*e*), or elſe the plaintiff may reply, that ſhe is EXECUTRIX *de ſon tort*, as in the caſe of *Stubbs v. Rightway* (*f*), and *Obalſton's caſe* (*g*), againſt the precedent in *Thompſon* (*h*); and ſo in the caſe of *Burnet v. Paget* (*i*). Caſe againſt the executor for the promiſe of the teſtator, who pleads in *abatement*, that the party died inteſtate, and that letters of adminiſtration were committed to him the defendant, *et hoc, &c. unde ex quo non nominatur, &c. petit jud. de billa*; in which caſe MR. GIRDLER was for the plaintiff: a traverſe in the caſe would be naught, becauſe it would tie up the plaintiff to prove the defendant executor of the laſt will, whereas poſſibly he is executor *de ſon tort*; and ſo was it adjudged in Trinity Term in the court of King's Bench, in the eighteenth year of *Charles the Second*, in the caſe of *Baker v. Pope*, which is in a private report of *Mr. Chriſtopher Bard.*

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PEMBERTON *for the plaintiff.* Debt againſt an executor; the defendant pleads in abatement letters of adminiſtration, with an

(*a*) Title, "Debt," fol. 221. num. 240.
(*b*) Raſt. Ent. fo. 805. num. 2.
(*c*) Robinſon v. Robinſon, Cro. Jac. 15.
(*d*) Sid. 301.
(*e*) Raſt. Ent. fol. 305. N° 2. of the old edition; but fol. 324, N° 2. on the B. ſide in the new edition.
(*f*) Cro. Eliz. 102. and S. C. Keb.
(*g*) Hob. 49.
(*h*) Thompſon's Precedents, 221.
(*i*) Trinity term, 26 Car. 2. in B. R. Roll 882.

LOVEDAY v. YOUNG.

absque hoc, that he was executor, &c.; and *per Curiam* the traverse was ill, for he ought to have relied on the letters of administration only, without saying more, *Williamson v. Norwich*, (*a*) *Hob.* 1652. *B. R. Rot.* 1667. EXECUTOR *de son tort* after action commenced against him takes out letters of administration, he may retain and plead it, but he shall not abate the writ.

PER CURIAM, It seems such a traverse would be naught, but doubtless it is good without it.

JUDGMENT was given for the plaintiff.

(*a*) Stiles 337. 3 Danv. 386. p. 12.

Case 355. Anonymous.

In what cases *foreign attachment* may be sued. Dyer, 196. Lutw. 984. 1 Roll Abr. 554. Carth. 26. 3 Leon. 236. 1 Com. Dig. "Attachment," (C.) (D.) Dagl 380.

FOREIGN ATTACHMENT lies not of any thing that sounds merely in damages, as covenant, or the like: it lies not really of a debt contracted out of * the jurisdiction; and in *Brown's case* there was pleaded a custom in *Exeter* for foreign attachments of any debt, and not saying "accruing within the city;" it was held naught; and so adjudged by the LORD HALE, upon that exception taken thereto by SIR FRANCIS PEMBERTON, on a writ of error out of the Common Pleas. The debt of a corporation is not attachable, because there ought to be three *capias's*, and a *non est inventus* returned, &c. A *bill of Middlesex* prevents an attachment as much as *an original*, because it is in lieu of one, and it is the foundation of the suit; and if laid to be *secundum consuetudinem Cur'*, it will be a bar.

* [374]

If a *foreign attachment* on which the money has been paid, is avoided, the original *creditors* may sue for it.

If money be attached and paid thereon, and afterwards the original creditor sues for the same, and the attachment happens to be ill pleaded, or otherwise avoided, the party must pay the money over again, and has no remedy neither in law nor equity.——1 H. Bl. Rep. 683.

Case 356. Anonymous.

Action lies for suing without cause in an inferior court.

INFERIOR COURTS: if suit be there without cause, an action lies, but not for a causeless suit in the courts at *Westminster*.——Ante, case 335.

False imprisonment for cause not within jurisdiction.

False imprisonment lies for one taken by process out of the inferior court, if the cause arose not within their jurisdiction.

Escape against sheriff.

Also a sheriff on action of escape shall take advantage of the causes arising out of the jurisdiction.

Qu. If a verdict in an inferior court can be pleaded in bar of an action for the same cause in the superior court, if it arose out of the jurisdiction.

But suppose A. sue in an inferior court in *London*, for pasturage of

cattle

cattle in *Eſſex* (which is plainly a cauſe out of the juriſdiction) and he recovers a verdict thereon, and afterwards he brings another action above for the ſame cauſe, and the defendant pleads in bar the proceedings below, and the plaintiff replies that the cauſe aroſe out of the juriſdiction: is this replication good? Can the plaintiff take advantage hereof himſelf? *Quære.* ANONYMOUS.

* Siddens *againſt* Johnſon.

Caſe 357.

Hilary Term, 35 & 36 *Car.* 2. *B. R. Roll* 10.

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LONDON *ſſ.* FRANCISCUS JOHNSON *nuper de* ISLINGTON *in com. Midd. gen. attachiat. fuit per corpus ſuum ad reſpondend.* ANNÆ SIDDENS *vid. quæ fuit uxor'* THOMÆ SIDDENS *de morte præd.* THOMÆ SIDDENS *quondam viri ſui unde eum appellat, et ſunt pleg. de proſequend. ſcilicet* ROBERTUS GRAVEY *de paroch. Chriſtchurch London butcher, et* THOMAS EVETTS *de parochia Chriſtchurch præd. victualler, et unde eadem* ANNA *per* JOHANNEM BROWNING *attorn. ſuum juxta formam ſtat. in hujuſmodi caſu edit. et proviſ. inſtanter appellat præd.* FRANCISCUM JOHNSON *de eo quod præd.* THOMAS SIDDENS *fuit in pace dei et domini regis nunc apud paroch. Sancti Sepulchri in warda de* FARRINGDON EXTRA *London præd. die Martis* SCILICET *viceſimo quinto die Decembris anno regni dict. domini regis nunc* 35. *circa primam horam in mane ejuſdem diei ibi venit præd.* FRANCISCUS JOHNSON *felonice ut felo dict. domini regis nunc ex malitia ſua præcogitat. et inſultu præmeditat. contra pacem dict. domini regis coronam et dignitatem ſuas die et hora præd. anno* 35. *ſuprad. apud parochiam et ward præd. et præd.* FRANCISCUS JOHNSON *adtunc et ibidem cum quodam gladio pretii duodecim denarior. quem ipſe* FRANCISCUS *tenuit in dextra manu ſua ipſum* THOMAM SIDDENS *præd. in latere ſuo ſiniſtro uſque ad cor ſuum adtunc et ibidem felonice percuſſit et dedit ei plagam mortalem de qua quidem plaga mortali idem* THOMAS SIDDENS *adtunc et ibid. incontinenter obiit, et ſic præd.* FRANCISCUS JOHNSON *præfat.* THOMAM SIDDENS *adtunc et ibid. felonice interfecit et muraravit et quam cito idem* FRANCISCUS *feloniam præd. fecerit fugit dictaque* ANNA *ipſum recenter inſecuta fuit quousque, &c. et ſi præd.* FRANCISCUS *feloniam præd. velit dedicere præfat.* ANNA *parata eſt verſus eum probare prout curia, &c.*

Record in an appeal of murder.

Vide ante, caſe 144. 168. & Poſt, 469. 474.

Et præd. FRANCISCUS JOHNSON *in propria perſona ſua venit et defendit vim et injuriam quando, &c. et omnem feloniam et murdrum et quicquid, &c. Et petit auditum brevis de appello præd. et retorn. ejuſdem brevis et ei leguntur in hæc verba ſſ.*

"CAROLUS SECUNDUS *dei gratia Angliæ Scotiæ Franciæ et Hiberniæ rex fidei defenſor, &c. vicecom. London ſalutem* * *quia* ANNA SIDDENS *vidua uxor* THOMÆ SIDDENS *fecerit nos ſecurum de clamore*

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SIDDENS v. JOHNSON.

clamore ſuo proſequendo per ROBERTUM GRAVEY *de parochia Chriſt-church London butcher, &* THOMAM EVETTS *de paroch. Chriſt-church London victualler ideo vobis præcipimus quod attachiatis* FRANCISCUM JOHNSON *de Iſlington in com. Midd. generoſ. per corpus ſuum ſecundum legem et conſuetud. regni noſtri Angliæ ita quod eum habeatis coram nobis in craſtin. Purificationis beatæ Mariæ ubicunque tunc fuerimus in Anglia ad reſpondend. præfat.* ANNÆ *de morte præd.* THOMÆ SIDDENS *quondam viri ſui unde eum appellat. et habeatis ibi tunc hoc breve* TESTEMEIPSO *apud Weſtm. decimo octavo die Januarii anno regni noſtri triceſimo quinto.*

" SHELBERY."

Virtute iſtius brevis nobis direct. cepimus corpus infranominat. FRANCISCI JOHNSON *cujus quidem corpus coram domino infraſcript. ad diem et locum infranominat. paratum habemus: reſponſio* PETRI DANIELIS *ar. et* SAMUELIS DASHWOOD *arm. vic.*

Quibus lectis et auditis idem FRANCISCUS JOHNSON *dicit quod prædict.* ANNA SIDDENS *appellum ſuum prædict. de morte prædict.* THOMÆ *verſus eum habere ſeu manutenere non debet quia dicit quod alias ſcilicet ad deliberationem gaolæ domini regis de* NEWGATE *tent. pro civitat. Lond. apud* JUSTICE-HALL, *in* LE OLD-BAILY *London in parochia Sancti Sepulchri in warda de* FARRINGTON EXTRA *London præd. die Mercurii ſcilicet decimo ſexto die Januarii anno regni domini noſtri Caroli Secundi dei gratia Angliæ Scotiæ Franciæ et Hiberniæ regis fidei defenſoris, &c.* 35. *coram* HENRICO TULSE *milite majore civitat. London* GEORGIO JEFFERYES *milite et baron. capitali juſticiario dict. domini regis ad placita coram ipſo rege tenend. aſſign.* THOMA JONES *mil. capitali juſticiario dict. domini regis de banco* FRANCISCO WYTHENS *milit. uno juſticiar. dict. domini regis ad placita coram ipſo rege tenend. aſſign.* RICHARDO HOLLOWAY *milit. alio juſticiario dict. domini regis ad placita coram ipſo rege tenend. aſſign.* WILLIELMO PRITCHARD *milit. uno aldermannorum civitat. London et* THOMA JENNER *milite un. de conſilio domini regis erudit. in lege ac recordatore ejuſdem civitat. ac aliis ſociis ſuis juſticiariis dict. domini regis ad gaolam ſuam de* NEWGATE *de priſonariis in ea exiſtentibus deliberand. aſſignat.* EDWARDUS SMITH *gen. coronator civitat. London per manus ſuas proprias deliberavit in curia deliberationis gaolæ dict. domini regis præd. quandam inquiſitionem coram eo adtunc nuper capt. ſuper viſum corporis præd.* THOMÆ SIDDENS *in curia ill. gaolæ deliberationis de recordo terminand, &c. quæ quidem* * *inquiſitio ſequitur in hæc verba ſſ.* LONDON *ſſ. inquiſitio indentata capt. pro ſereniſſimo domino rege apud parochiam Sancti Sepulchri in warda de* FARRINGDON EXTRA *London præd. die Martis ſcilicet* 25 *die Decembris anno regni domini noſtri Caroli Secundi dei gratia Angliæ Scotiæ Franciæ et Hiberniæ regis fidei defenſor', &c.* 35 *coram* EDWARDO SMITH *gen. coronat. civitat. London ſuper viſum corporis cujuſdam* THOMÆ SIDDENS *adtunc et ibidem mortui jacentis per ſacramentum* JOHANNIS EELE THOMÆ SAVAGE T. S. J. D. J. S. G. W. W. D. T. S. T. C. R. D. T. N. W. T. E. E. R. S. J. M. W. J. R. P. *et* A. B. *proborum et legalium hominum civitat. London præd. qui adtunc et ibidem jurat. et onerat. exiſtent. ad inquirend. pro dicta*

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dicto domino rege quando ubi qualiter et quomodo præd. THOMAS SIDDENS *ad mortem ſuam devenit dicunt ſuper ſacramentum ſuum quod quidam* FRANCISCUS JOHNSON *nuper de* LONDON *gen.* ARTHUR GRAHAM *nuper de* LONDON *gen. et* RICHARDUS GRAHAM *nuper de* LONDON *gen. deum præ oculis ſuis non habentes ſed inſtigatione diabolica moti et ſeducti dicto* 25 *die Decembris anno* 35 *ſuprad. circa primam horam in nocte ejuſdem diei vi et armis, &c. apud London videlicet in paroch. et warda præd. in et ſuper præfat.* THOMAM SIDDENS *in pace dei et dict domini regis adtunc et ibidem exiſtentem felonice voluntarie et ex maliciis ſuis præcogitatis inſultum fecerunt, et quod præd.* FRANCISCUS JOHNSON *adtunc et ibidem cum quodam gladio* ANGLICE *a ſword de ferro et chalybe confect. valoris quinque ſolidorum, quem ipſe idem* FRANCISCUS JOHNSON *in manu ſua dextra adtunc et ibidem extractum habuit et tenuit præfat.* THOMAM SIDDENS *in et ſuper ſiniſtram partem ventris ipſius* THOMÆ SIDDENS *paulo ſupra umbilicum* ANGLICE the navel, *ipſius* THOMÆ SIDDENS *adtunc et ibidem violenter felonice voluntarie et ex malitia ſua præcogitata percuſſit et inforavit dans eidem* THOMÆ SIDDENS *adtunc et ibidem cum gladio præd. in et ſuper præd. ſiniſtram partem ventris ipſius* THOMÆ SIDDENS *paulo ſuper umbilicum* ANGLICE the navel, *ejuſdem* THOMÆ SIDDENS *unum vulnus mortale latitudinis dimid. unius pollicis et profunditat. trium pollicium de quo quidem vulnere mortali præfat.* THOMAS SIDDENS *adtunc & ibidem inſtanter obiit, ac quod præd.* ARTHUR GRAHAM *et* RICARDUS GRAHAM *adtunc ſcilicet* 25 *die Decembris anno* 35 *ſuprad. tempore feloniæ et murdri præd. per præd.* FRANCISCUM JOHNSON *in forma præd. felonice voluntarie et ex malitia ſua præcogitat. fact. et perpetrat. apud paroch. et ward. præd. felonice voluntarie et ex malitiis ſuis præcogitatis fuerunt et uterque eorum fuit præſens abettans aſſiſtens auxilians confortans * et manutenens præfat.* FRANCISCUM JOHNSON *ad feloniam et murdrum præd. in forma præd. felonice voluntarie et ex malitia ſua præcogitat. ad committend. et perpetrand. et ſic juratores præd. ſuper ſacr'um ſuum præd. dicunt quod præd.* FRANCISCUS JOHNSON ARTHUR GRAHAM *et* RICHARDUS GRAHAM *præfat.* THOMAM SIDDENS *dicto* 25 *die Decembris anno ſuprad. apud paroch. et ward præd. modo et forma præd. felonice voluntarie et ex malitiis ſuis præcogitatis interfecerunt et murdraverunt contra pacem dict. domini regis nunc coron. et dignitat. ſuas, &c. et juratores præd. ulterius dicunt ſuper ſacr'um ſuum quod præd.* FRANCISCUS JOHNSON ARTHURUS GRAHAM *et* RICHARDUS GRAHAM *tempore feloniæ et murdri præd. per ipſos* FRANCISCUM ARTHURUM *et* RICHARDUM *in forma præd. felonice voluntarie et ex malitiis ſuis præcogitatis fact. et perpetrat. ſeu unquam poſtea hucuſque non habuerunt nec eorum aliquis habuit nec adhuc habent ſeu habet aliqua bona ſeu catalla terras ſive tenementa infra civitat. London præd. ſeu alibi ad notitiam eorund. jurator. in cujus rei teſtimonium tam præfat. coronator quam juratores præd. huic inquiſitioni ſigilla ſua appoſuerunt die anno et loco ſuprad.*

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EDWARD SMITH *coron.*

Et quod ad præd. deliberationem gaolæ dict. domini regis de NEWGATE *in pro civitat. London præd. apud* JUSTICE-HALL *præd. in paroch.*

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et warda præd. dicto die Mercurii ſcilicet 16. *die Januarii anno* 25. *ſuprad. coram præfat. juſticiariis venit præd.* FRANCISCUS JOHNSON *ſub cuſtodia* PETRI DANIEL *arm. et* SAMUELIS DASHWOOD *arm. vic. com. civitat. London præd. in quorum cuſtodia præantea ex cauſa prad. commiſſus fuit, et ſtatim præd.* FRANCISCUS JOHNSON *ad barram ibid. duct. per præfat. vicecom. ac de præmiſſis ei ſuperius per inquiſitionem præd. impoſitis allocutus qualiter ſe vellet inde acquietari, idem* FRANCISCUS *tunc dixit quod ipſe in nullo fuit inde culpabilis et inde de bono et malo tunc poſuit ſe ſuper patriam et* WILLIELMUS WAGSTAFFE *arm. communis clericuscivitat. London qui pro dicto domino rege in ea parte ſequebatur ſimili', &c. etjuratores juræ illius per præfat. vicecom. in ea parte returnat. et impanellat. ſcilicet* J. N. B. M. E. A. J. N. K. S. L. L. T. M. M. W. A. B. D. R. *et* L. H. *exact. venerunt qui ad veritat. de et ſuper præmiſſis dicend. electi triat. et jurat. tunc dixerunt ſuper ſacr'um ſuum quod præd.* FRANCISCUS JOHNSON *non fuit culpabilis de murdro præd. in inquiſitione præd. ſpecificat. ei impoſit. prout idem* FRANCISCUS *placitando allegavit, ſed iidem juratores ſuper ſac'rum ſuum præd. ulterius tunc dixerunt quod præd.* FRANCISCUS JOHNSON * *fuit culpabilis de felonia et homicidio tantum pro felonice interficiend. præfat.* THOMAM SIDDENS *in inquiſitione præd. nominat. ei per inquiſitionem præd. impoſit. modo et forma prout per inquiſitionem præd. verſus eum ſupponebatur, quodque præd.* FRANCISCUS JOHNSON *tempore feloniæ et homicidii præd. per ipſum.* FRANCISCUM JOHNSON *in forma præd. commiſſ. et perpetrat. ſeu unquam poſtea non habuit aliqua bona ſeu catalla terras ſive tenementa infra civitat. London ſeu alibi ad notit. eorundem jurator. prout per record. inde in ſuis pleno robore et effectu modo exiſten. et inter record. ejuſdem gaolæ deliberationis coram juſticiariis gaolæ deliberationis de* NEWGATE *pro civitat. London apud London. præd. remanent. int. alia plenius apparet. et idem* FRANCISCUS JOHNSON *ulterius dicit quod nullum judicium de et ſuper præmiſſis adhuc reddit. exiſtit et quod ipſe idem* FRANCISCUS JOHNSON *tunc fuit et eſt clericus et adtunc et ibid. ad eandem gaolæ deliberationem coram juſticiariis ultime prænominat. paratus fuit legere ut clericus ſi curia illa eum ad librum ſuum in ea parte admittere vellet & adhuc in barram alicujus judicii mortis ſuper convictionem homicidii præd. paratus eſt legere ut clericus, et hoc paratus eſt verificare, unde petit judicium ſi præd.* ANNA SIDDENS *appellum ſuam præd. verſus eum de morte præd.* THOMÆ SIDDENS *habere ſeu manutenere debeat, &c. cum hoc quod præd. idem* FRANCISCUS JOHNSON *verificare vult quod ipſe idem* FRANCISCUS JOHNSON *modo appellat. et præd.* FRANCISCUS JOHNSON *ſuperius in inquiſitione nominat. in forma præd convict. ſunt una eademque perſona et non alia neque diverſa et quod præd.* THOMAS SIDDENS *de cujus morte ipſe idem* FRANCISCUS JOHNSON *modo appellatus exiſtit et præd.* THOMAS SIDDENS *in inquiſitione præd. nominat. et pro cujus morte idem* FRANCISCUS JOHNSON *in forma præd. convict. exiſtit ſunt una et eadem perſona et non alia neque diverſa, et quod præd. plaga de qua in apello præd. ſupponitur ipſum* THOMAM SIDDENS *obiiſſe et præd. plaga de qua in inquiſitione præd. ſupponitur ipſum* THOMAM SIDDENS *mortuum fuiſſe ſunt una et eadem plaga mortalis et non alia neque diverſa, et petit de præmiſſis allocationem,*

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allocationem, &c. et quoad feloniam et murdrum præd. idem Franciscus Johnson *dicit quod ipſe in nullo eſt inde culpabilis, et inde de bono et malo ponit ſe ſuper patriam, &c.*

William Hall.

Et præfat. Anna *ſimilit', &c. Et præd.* Anna Siddens *quoad placitum præd. præd.* Franciscus Johnson *de convictione præd. modo et forma præd. ſuperius placitando placitat. dicit quod ipſa* Anna *per aliqua per præd.* Franciscum Johnson *inde ſuperius placitando allegat. ab appello ſuo præd. verſus præd.* Franciscum Johnson *modo et forma præd. inde in barram appelli præd. ſuperius placitando placitat. materiaque in eodem content. minus ſufficient. in lege exiſtunt, ad quod quidem placitum eadem* Anna Siddens *neceſſe non habet nec per legem terræ aliqualit. reſpondere tenetur unde pro defectu ſufficient. reſponſionis in hac parte eadem* Anna Siddens *petit judic. et execution. verſus eundem* Franciscum Johnson *de et ſuper præmiſſis fieri, &c.* * [380]

Bartho. Shower.

Et præd. Franciscus Johnson *quoad placitum ipſius* Franciſci *de convictione præd. ſuperius placitat. dicit quod placitum illud modo et forma præd. ſuperius placitat. materiaque in eodem content. bona et ſufficien. in lege exiſtunt ad præd.* Annam Siddens *ab appello ſuo præd. verſus ipſum* Franciscum Johnson *habend. præcludend. et ad appellum illud penitus evacuand. quod quidem placitum materiamque in eodem content. idem* Franciscus Johnson *paratus eſt verificare et probare prout cur', &c. et quia præd.* Anna Siddens *ad placitum ill. non reſpondit nec ill. hucuſque aliqualit. dedicit idem* Franciscus Johnson *ut prius petit judic. et quod præd.* Anna Siddens *ab appello ſuo præd. verſus ipſum* Franciscum Johnson *habend. præcludatur, &c. Et quia cur. dict. domini regis hic de judic. ſuo de et ſuper præmiſſ. reddend. nondum adviſatur dies inde dat. eſt partibus præd. coram dicto domino rege a die Paſchæ in quindecim dies ubicunque, &c. de judicio ſuo de et ſuper præmiſſ. audiend', &c. eo quod cur. dict. domini regis hic nondum, &c. et quoad triand. exit præd. inter partes præd. junctum ceſſet inde proceſſus quouſque præd. materia in judicium curiæ in forma præd. placitat. aliquo modo legitime terminetur, &c. et ſuper hoc venit* Richardus Filkins *de paroch. Sancti Martini in Campis in com. Midd. gen.* Martin. Bond *de eadem paroch. et com. præd. mercator* Johannes Baley *de eadem paroch. et com. præd. poulterer* Richardus Thomas *de eadem paroch. et com. præd. coquus in propriis perſonis ſuis et manuceperunt habend. corpus præd.* Franciſci Johnson *coram dicto domino rege ad eundem terminum et ſic de die in diem quouſque, &c. quilibet manucaptor. præd. corpus pro corpore, &c.* * [381]

The

SIDDENS v. JOHNSON.

THE CASE.

To an appeal of murder the defendant may plead that he was convicted of manſlaughter on an indictment for the ſame offence and prayed his clergy thereon.—— Ante, 268. 4 Co. 46. Kely. 94. Cro. Jac. 28.

AN APPEAL of *murder* was brought by *Siddens*, as widow, for the death of her late huſband, againſt the defendant *Johnſon*, who craving *oyer* of the writ and its return, pleads a conviction of manſlaughter and that no judgment was given thereon; that he then was and is *a clerk*, and then and there was ready to read as a clerk, if the court there would then have admitted him to his book in that behalf; and yet in bar of any judgment is ready to read; with a *paratus eſt verificare prout cur'*, &c. and prays judgment if the plaintiff ought to have her ſaid appeal, with an averment of the identity of the perſon ſuppoſed murdered; and of the defendant, and of the wounds, and prays allowance, &c. and pleads over *not guilty*, &c. To the *not guilty* iſſue is joined: To the plea of the conviction the appellant demurs; and the defendant joins.

SHOWER *for the appellant* argued: That the defendant's plea is naught.

FIRST. That ſince, and by the ſtatute of 3 *Hen.* 7. *c.* 1. it is no good bar.

SECONDLY. Suppoſe our caſe be *caſus omiſſus* and out of that ſtatute, it is no good plea at common law.

FIRST. As to the ſtatute: before that time a felon could not be tried till the year and day were out, at leaſt the uſage was ſo, and that the ſtatute itſelf declares in the eleventh ſection, where the grievance and miſchief is recited, *viz.* "That afore that time no felony was "to be determined till after the year and day at the king's ſuit, for "ſaving the party's ſuit, and that during ſuch time the felon uſually "compounded with the appellant, and the offence became forgotten, "and the criminal went unpuniſhed"; therefore it was ordained, "that the felon might be arraigned and tried upon the indictment "within the year;" however with this proviſion on which our preſent queſtion ariſes, "That if it fortune that felons, murderers, "and acceſſories, or any of them, be acquitted, or the principal "attainted, the wife or next heir to him ſo ſlain, may have their "appeal againſt the perſons ſo acquitted, or againſt the perſons ſo "attainted, if they be alive, and that his benefit of clergy thereof
*[382] "before be not had." * Now we are within the plain intention of the act, for if we might have our appeal againſt him that is attainted, and has not had his clergy, then certainly againſt him that is neither attainted, nor had his clergy; and that law which gives us the greater, will never ſurely exclude us from the leſs. It is manifeſt here was an advantage deſigned to the appellant; this act likewiſe giving an allowance for an attorney in this action for the appellant. The words may have the like advantage as if no ſuch attainder or acquittal had been. It is not ſaid, as at common law before the ſtatute, but as if no ſuch trial were or had been had; whence it may be inferred that the deſign of the law-makers was, that no proceeding whatſoever on the indictment ſhould be a bar, unleſs benefit of clergy were had. Alſo here is the word "attainted," which includes and implies

implies a *conviction*; that ſhall not be intended only of a perſon who has judgment of death, but extends to any perſon convict by verdict; for one attainted is a perſon convicted and ſomewhat more, *et omne majus continet in ſe minus*, and if an appeal be given againſt a perſon attainted, then certainly againſt one that is only found guilty. Beſides, "attainted" and "convicted," though really different are yet frequently uſed as ſynonimous terms, and the one oftentimes made uſe of when the other is meant and intended: and that in acts of parliament, as in 25 *Edw.* 3. *c.* 2. is this expreſſion, "attainted by verdict," which is no more than to ſay "convict by verdict:" and in 1 & 2 *Philip* and *Mary*, *c.* 10. it is ſaid, "being thereof lawfully convict "or attainted, ſhall be deemed, judged, and ſentenced as traitors;" and it is ſo taken in the French "*etre attaint et nayem en aucun caſe*," that is to be caſt in any caſe; and ſo it is uſed in the ſtatute *Weſtminſter the firſt*, *cap.* 37. where it is ſaid, "If a man be attainted by "diſſeiſin, *per recogniſance* of aſſiſe of *novel diſſeiſin*;" and in common parlance, a perſon found guilty by a verdict is ſaid to be attainted of felony; and acts of parliament do frequently ſpeak *ut vulgus*; and the rather ſhould it be ſo conſtrued here, becauſe the word "attainted" is uſed in oppoſition to the word "acquittal," which in that place muſt be underſtood to be by verdict. * And methinks it would ſeem ſtrange, that this clauſe ſhould enable one to bring an appeal againſt a perſon acquitted on a fair trial by the judgment of twelve men, and in the eye of the law be deemed innocent, and not againſt one who by two juries is found to be a felon? But perhaps it may be objected, that this being a penal law, your Lordſhip will not, by any equitable conſtruction, extend it further than the very letter; but with ſubmiſſion this ſtatute is no ſuch, it neither creates a new offence, nor inflicts any new or greater puniſhment, and is merely directory for the better execution of former laws; and the true reaſon of the objection in any caſe is, becauſe no man ſhould be puniſhed for any matter which he was ignorant whether it were an offence or no; and therefore nothing to be adjudged within ſuch penal law, but what was plainly expreſſed in the very words; but our caſe is not ſo. Beſides, ſuch a conſtruction is no novelty even in thoſe laws that are ſtrictly and literally penal; for a penal law may and ought to be extended by equity to advance the remedy, and ſuppreſs the miſchief; the miſchief in our caſe was the impunity of criminals; the remedies by this law are two.—FIRST, The proceeding on indictments within the year.—SECONDLY, The action of appeal notwithſtanding ſuch ſuit on indictment. There is 25 *Edw.* 3. *c.* 2. killing one's maſter is adjudged treaſon, and yet in 19 *Hen.* 6. *c.* 47. and ever ſince to this very day, for a ſervant to kill his or her miſtreſs is adjudged within it by conſtruction. By 5 *Hen.* 6. *c.* 12. it is ordained, "That if any record, or any part of it, be wilfully ſtolen, "raſed, altered, or avoided, whereby any judgment is reverſed, it "ſhall be deemed felony:" and in 2 *Rich.* 3. *fol.* 19. an action of debt was brought againſt J. B. whereas in truth his name was *N. B.* and proceſs continued to outlawry, and the original and three *capias's* were raſed and altered, and made *N. B.* and the roll altered accordingly; this was adjudged felony within the ſtatute by all the juſtices, though the outlawry was hereby made good. * Alſo my LORD COKE

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COKE tells us (*a*) that this very clauſe in this very ſtatute has received ſuch an equitable conſtruction; and that in the caſe of one *Agnes Gainsford*, that where the act ſays, "the wife or heir of him "ſo ſlain ſhall have their appeal," yet the heir of a woman murdered ſhall have an appeal againſt a perſon acquitted on an indictment of the ſame murder; though by the letter of this law no appeal be given of the death of a woman. Now if your lordſhip ſhall be of opinion, that a *conviction* is within this ſtatute, as well as an *attainder* by judgment of death, then the defendant's plea is naught, for, not having had the benefit of clergy, he is not within the exception of this clauſe, for his plea is only, that he was and is a clerk, and *paratus legere*, which is not ſufficient, as I humbly hope to prove preſently.

SECONDLY, Suppoſing this to be *caſus omiſſus*, and out of the ſtatute, then the queſtion is barely this, whether the conviction of a clerk of manſlaughter, who has not had the benefit of his clergy allowed, nor ſo much as prayed, is a ſufficient bar to an appeal of murder?

To an appeal of murder the defendant may plead in bar that he was *autrefois convict* of manſlaughter on an indictment of murder for the ſame offence, and was ready to pray his clergy thereon.
Ante, 168.
4 Co. 46.
Kely. 94. 107.
Cro. Jac. 28.
3 Inſt. 131.
1 Mod. 157.
5 Burr. 2801.
4 Mod. 100.
2 Com. Dig. Appeal (G 7)

FIRST, The conviction alone is no bar: It muſt be agreed, that an appeal had the precedence, though I will not ſay but the king might have proceeded on an indictment being found, even within the year, in caſe no appeal were brought; but yet in caſe an appeal were brought though at any time, though even at the trial of ſuch indictment, after the jury were ſummoned and did appear, there all proceedings on the indictment ought to ſtay till the party ſhould be arraigned on the appeal, otherwiſe the appellant would be defeated of his or her ſuit; and accordingly is the Year Book of *Henry* the *ſixth* expreſs (*b*) and ſo is *Staundford*, (*c*) So that, my Lord, the party's action was preferred; and upon this reaſon, becauſe if ſuch felony were determined on the indictment, either by acquittal or attainder, the appellant would be barred, for *auter foits attaint*, or *auterfoits acquit* were good pleas in bar. * The reaſon of the former was, becauſe the law had its utmoſt end; he could but forfeit his life and eſtate; and this was done by the attainder; he was put *extra legem*, not only as to himſelf but as to others: for he having received judgment of death, was reckoned *mortuus in lege*; and to kill a dead man were idle, *lex nil facit fruſtra*, ſo that he could not be called to anſwer, neither at the ſuit of the king, nor of any appellant, for that ſame or any other felony before committed: nay, if he were attainted by outlawry, he could not be arraigned for any other felony till that outlawry were reverſed; which reaſon fails in our caſe, for here is no attainder. But an *auterfoits convict* was never, nor is it now any plea in diſcharge of any other felony; and the practice every day before your lordſhip at THE OLD BAILEY is accordingly, that highwaymen and murderers after conviction for one offence, are arraigned and tried for others the ſame ſeſſions, and at laſt receive one judgment of death upon them all; and if *auterfoits convict* be no plea in diſcharge of another felony, as *auterfoits attaint* is, then it is no

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(*a*) 4 Co. 46.
(*b*) 31 Henry 6. pl. 11.
(*c*) Staunford, Pleas Crown, lib. 2. cap. 36. fol. 107.

bar

bar to an appeal for the ſame felony; the reaſon holds alike in both, becauſe the firſt ſuit is not determined. The reaſon why an *acquittal* was a bar at the common law is, becauſe he is found innocent, and an innocent man ſhall not be put twice in jeopardy of his life; but here is a felon, and ſo agreed by his own plea; he comes within neither of the reaſons of an *attainder* or an *acquittal* being a bar; for the firſt, there is no forfeiture accrued to the king of his life; for the ſecond, he cannot pretend to the privilege of innocence, and ſo not to be put twice in jeopardy of his life, ſo that he has anſwered the law neither way. If the king's ſuit were determined, then I muſt agree it would have been a good bar, but this is no more than an indictment depending; and ſurely an indictment and arraignment thereon cannot be pretended to be any bar.

SECONDLY, This conviction, which, with the other matter alledged of being *a clerk* is no bar; and the *paratus fuit legere* will no ways help him.

* To make no more queſtions than needs, I will agree that allowance of clergy would have been a bar in this caſe, for it comes in lieu of an attainder, and is a determination of the king's ſuit; and ſince the ſtatute of *Queen Elizabeth*, (*d*) which takes away purgation, the law has its end in its proceeding againſt ſuch offender, upon his having had the benefit of his clergy allowed; for there is a *ne plus ultra*; but that this benefit muſt be prayed by the party, and allowed by the court before he ſhall have any advantage of it, I ſhall humbly endeavour to prove by theſe following arguments, drawn, * [386]

FIRST, From its nature and original.

SECONDLY, From the form of entries in ſuch caſes.

THIRDLY, From the effect of this privilege in other caſes.

FIRST, For its original and nature. When the uſage began is not material; its original ſeems to be founded on ſomewhat in the canon law that pretended to exempt clergymen from all temporal juriſdictions; but this never prevailed in *England*, whatſoever it did or doth in other countries, the *clericks* here being always tried and puniſhed by the ſecular authority, whenſoever they had committed any civil crimes; the eccleſiaſtical courts here never having power to examine or puniſh any offences of ſuch nature, as murder, theft, robbery, &c. However by the common law it was allowed as a privilege to learned men in reverence to knowledge, for to ſave the life of a learned ſinner, and ſuch other perſons as by their ability to read might in probability be capable of public ſervice in the kingdom; and ſo is it deſcribed in LORD HOBART, (*e*) ſo that as it was claimed by ſome churchmen in all caſes, and as it has been, and now is allowed by our laws in ſome caſes, take it both ways it is a privilege, and ſo is it termed in all the books that do mention it, which being a privilege, its very being ſo implies, that it muſt be demanded either by the ordi-

(*d*) See 8 Eliz. c. 4. ſ. 3; 18 Eliz. c. 7.
(*e*) Hob. 288.

nary

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nary or the party himſelf. Of old in ancient time it was demandable before conviction, and at that time if a man ſaid he was *a clerk*, and demanded the privilege of clergy as ſuch, and afterwards relinquiſhed that plea, and pleaded *not guilty*, and was convicted, he ſhould be
*[387] * hanged, and ſhould not again pray it; and ſuch are the words of the book, 12 *Aſſiſ.* 15. And the ſame reaſon holds for demanding it now, ſince it has been adjudged not grantable till after verdict, which was for two reaſons.—FIRST, To retain a juriſdiction over the clergy, which they endeavoured to diſannul by pretending themſelves abſolutely exempt, and ſo challenging the priſoner at firſt.—SECONDLY, Another reaſon was, that the king might not loſe the forfeiture of their goods and chattels, which aroſe by their conviction, and by conſequence that they might not go utterly unpuniſhed: and why it ſhould not be neceſſary to be demanded now as well as then there is no reaſon. It is a privilege, the fruit whereof is the ſaving of the offender's life, and ſo it ſeems like a private pardon, which muſt be pleaded, or otherwiſe the court *ex officio* is not bound to take notice thereof for the party's advantage; or at moſt it can be compared to a general act of oblivion, in which divers crimes and divers offenders are excepted, which muſt be pleaded, that it may appear to the court that the party is not within the exception. And beſides this, all the acts of parliament which ouſt men of their clergy in particular caſes ſay, he ſhall not be admitted to the benefit of his clergy, which ſuppoſes a prayer or demand in the very word "admiſſion."

Now there are two reaſons more eſpecially why clergy ſhould be demanded, otherwiſe no advantage ſhould be taken.—FIRST, That the court may judge whether he were not antecedently rendered incapable of being admitted to his book, as conviction of hereſy, apparent infidelity, judaiſm, or the like; all which are impediments and incapacities of this privilege, as is *Poulter's caſe*, 11 *Co.* 29. which caſe names them and many more.—SECONDLY, That the court may judge, if he be a clerk, whether he can read, and may any way be uſeful to the kingdom; of all which the court is judge, and not the ordinary as has been pretended in old time; and ſo is 9 *Edw.* 4. *pl.* 28. and
*[388] the ſame caſe abridged in * *Bro. tit. Clergy*, 7. where it is adjudged, that if the ordinary challenge him, and ſay "*he reads*," when in the judgment of the court he does not read, the ordinary ſhall be fined and the felon hanged: and he muſt be able to read audibly and truly, and barely by ſpelling to pick out a word is not ſufficient. So that the nature of the thing requires it ſhould be demanded, and the practice is always ſo in all courts and with all perſons, even peers of the realm; and ſo did the late *Earl of Pembroke*, who before the lord high ſteward was found guilty of manſlaughter, he prayed the benefit of his peerage, according to the ſtatute which diſcharges peers on ſuch conviction, as commoners when they read and were burnt in the hand. And for an expreſs authority there is the caſe of *Searle v. Williams* (*f*) where it is laid down as one of the three things to be obſerved in giving and taking of clergy at the common law, that the

(*f*) Hob. 289.

court

court is not to render it *ex officio*, but the party is to demand it as being a favour, and a remitting of the rigour of the law; thoſe are the very words of the book.—SECONDLY, The forms of the entry in ſuch caſe prove it; in *Alexander Poulter's caſe*, (*g*) it is ſaid, that upon conference had with ſeveral clerks of aſſiſe, and upon view of ſundry records, it appears that they make an entry, "*petit librum, et tradito ei libro legitut clericus*," or elſe it is "*petiit beneficium clericale*," and ſo are all the entries when they come to be made into records: and ſo in *Stone's caſe* (*h*) it is "*et petit librum et tradito ei libro legit, &c.*" and ſo is *Foxley's caſe*, (*i*) and before the ſtatute of 5 *Eliz. c.* 4. there was a formal judgment entered "*quod tradatur*," or "*talis comiſſus eſt ordinario, &c.*" all which prove it muſt be demanded, as oyer of any deed or record in pleading, where it is *petit auditum, &c*; and the manner of entries proves the law as much as any thing, &c.——THIRDLY, And in other caſes, and to all intents and purpoſes, which are the fruit and effect of this privilege, it muſt be demanded and allowed; as that if the principal be a clerk and convicted, the acceſſory is not diſcharged till it be demanded and allowed; and ſo is the 26 *Aſſiſe*, 27 *Hen.* 7. *fol.* 1. the principal * taking the book the acceſſory is diſcharged and not before; and ſo is *Dyer's caſe* (*k*) and the caſe of *Goffe v. Byby* (*l*) in the ſame book, as alſo in 3 *Cro.* 541. And as to the acceſſory, ſo alſo to the principal, *auterfoits convict*, and allowance of clergy after the ſtatute of 25 *Edw.* 3. *c.* 5. had been a bar to an arraignment of any other felony before the ſtatute of 8 *Eliz. c.* 4. and thereby after purgation, and by 18 *Eliz. c.* 7. after burning in the hand, which makes him anſwerable for all other felonies. Now will any man ſay that ſuch a plea as this, at that time, would have been a bar to an indictment for another felony? if not, why ſhould it be ſo in this caſe? I will agree burning in the hand not to be material, but only a collateral and exemplary puniſhment inflicted by 4 *Hen.* 7. *c.* 13. and perhaps murder and manſlaughter may be all one as to this point, clergy being formerly allowable in the one as well as in the other; but yet in both it muſt be demanded by the party and allowed by the court. Now my Lord, if the nature of the thing be ſuch that it muſt be demanded, or no advantage can be taken of it for the ſaving the offender's life on that indictment, no more will it on this ſuit; for *vigilantibus non dormientibus, &c.* he did not what was incumbent on him, he might have prayed his clergy though not called upon to receive judgment; the court were not bound to tender the book *ex officio*; and were it not demandable till he was called upon to receive judgment, yet in this matter that will not help him, for all that reſults from it is, that we were before hand with him with our appeal, which did, as it ought, ſurceaſe all further proceedings on the indictment; as it ought, I ſay, for ſo was the caſe I cited before of *Staundford's Pleas of the Crown* (*m*). My LORD BRIDGMAN was of that opinion in the caſe of one *Tothil, Yardley and others*, who all at *Maidſtone aſſizes* in *Kent*, were indicted for the murder of one *Sampſon*, and convicted of manſlaughter: he

* [389]

(*g*) 11 Co. 35.
(*h*) Dyer, 214.
(*i*) 5 Co. 110.
(*k*) 4 Co. 43.
(*l*) 4 Co. Cro. Eliz. 541.
(*m*) S. P. C. 107.

was

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was ſo far from reckoning that conviction alone to have been a bar to an appeal, that on the widow's bringing an appeal he ſurceaſed all further proceedings on the indictment, and never called the men to

*[390] * receive judgment, and the parties were tried afterwards at this bar for the ſame murder upon the appeal, which if they had thought a bar would certainly have been pleaded; this is in *Sid.* 216. 324. Here was likewiſe the caſe of *Sir Philip Lloyd* in this court, *Hill.* 33 & 34 *Car.* 2. who having been convicted of manſlaughter appeared here, and, an appeal being brought, was denied by the whole Court the opportunity of praying his clergy until he had been arraigned on the appeal; for as much as they were appriſed that allowance of clergy would have been a bar, but a bare conviction of manſlaughter was not; and had the law been thought otherwiſe, his counſel would have pleaded that; but inſtead of that he compounds the cauſe, and the appellant became nonſuit, and then his clergy was prayed and allowed, and, the burning being pardoned, he was diſcharged. And in this very caſe, and one *Scarlet's caſe*, at THE OLD BAILEY, your *Lordſhip* and my *Lord Jones*, with the reſt of the judges then preſent, did, upon bringing appeals, ſurceaſe all further proceedings on the indictments, although the parties were convicted of manſlaughter. There is a caſe or two that ſeems to thwart what I have here offered which I ſhall anſwer, *viz.* The caſe of *Burgh v. Holcroft*, (*n*) where an indictment of manſlaughter within the verge and confeſſion of the fact, and prayer of clergy, and reſolved a bar to an appeal of murder. To this I anſwer, that whether that be law I muſt ſubmit to your Lordſhip's judgment, for, as the caſe is in 1 *And.* 68, it is agreed, that a conviction of murder, the judgment being reſpited and not given thereon, is no bar to an appeal; for otherwiſe the intent of the ſtatute would be abſolutely avoided; and here is no more in our caſe, and our caſe comes not up to that of *Holcroft*, for as the entry is in *Coke's Entries*, 55. there he pleads his conviction, "*et quod idem* THOMAS HOL-"CROFT *adtunc et ibidem dixit quod ipſe fuit clericus et petit beneficium* "*clericale in hac parte ſibi allocari*," and then there is a *curia adviſare vult, &c.* ſo that *Holcroft* had demanded his clergy, and

*[391] pleads this, upon which * iſſue might have been taken; he did all he could to have it allowed: in our caſe he only ſays *paratus fuit legere*, which is idle, for it amounts no more to a prayer of clergy than a *paratus fuit recipere* does to a perſonal demand when neceſſary; beſides, that agreeable to the other of the *Lord Hobard's* rules, that clergy ought to be allowed where prayed, and grantable. The ſecond caſe is that of *Wrote v. Wigges*, (*o*) I anſwer, that goes further than *Holcroft's caſe*, for he there pleads, "*quod petiit beneficium clericale* "*et tradito ei libro legit ut clericus prout patet per record. inde, &c.* there is a demand and a trial of his clerkſhip, and an entry upon record of his ability to read; but ours is an allegation uncertain, and at moſt but preſumptive; he ſays it is "*paratus fuit legere ſi cur. ill. ad librum vellet ipſum admittere*, which can never be tried whether the Court

(*n*) 4 Co. 45. 3 Inſt. 131. 2 Leon; 16. 83. 1 And. 68.
(*o*) 4 Co. 45.

would

would admit him, unleſs he had prayed it. There is another caſe, *Brookes's caſe*; (*p*) where one was convicted on an appeal of robbery, and the appellant died before judgment, and it is adjudged a bar to an indictment; to which I anſwer, that there it is not adjudged a bar, as an *auterfoits convict*, but as an acquittal, which on an appeal is a bar to an indictment, though not *è contra*; and as the caſe is in 2 *Leon.* 83. it was moved by EGERTON, that he might be arraigned on the declaration again as for the queen, but the Court was of opinion that the act of God, by the death of the appellant, had delivered him; but the better opinion there was, that the defendant ſhould be arraigned on the whole record, and the party ſhould plead *auterfoits acquit*, and that would be the ſureſt way, and as an acquittal it would be a good plea; and ſo my LORD COKE ſeems to miſtake in ſaying *auterfoits convict*, whereas it ſhould be *auterfoits acquit*. And then beſides, there is a vaſt difference between a proceeding on an appeal and on an indictment; for its being a bar to an indictment, there is more reaſon than there is for that of an appeal; for in the appeal the king is intereſted and the appellant both; on an * indictment not ſo; and therefore the king may proceed upon an appeal upon the death of the appellant; which is one main reaſon why appeals had the precedence, becauſe upon them the party might be afterwards arraigned at the king's ſuit by indictment. Beſides, there is a vaſt difference between an *appeal of murder* and an *appeal of robbery*, for pending an *appeal of murder* proceedings on any indictment were ſtayed, becauſe otherwiſe the year and day might be run out, but never ſo in *an appeal of robbery*, becauſe an appeal thereof might be brought at any time, even twenty years after the fact; and ſo is it in *Doylie's caſe*, 2 *Leon.* 16.

* [392]

Then I took ſome exceptions to their plea:

FIRST, They ought to have concluded their plea, *et petit judicium ſi præd.* FRANCISCUS *iterum de eadem morte de qua ſemel convictus fuit, reſpondere compelli debeat*, and not as they have done, *ſi appel'*, &c.

SECONDLY, To the inquiſition; and if that be naught, it muſt be agreed their plea is naught, for it is not ſaid when the murder was committed; or rather it is laid to be at an impoſſible time, viz. "25 *die Decembris prima hora in nocte ejuſdem diei*;" and when that was I cannot tell.

THIRDLY, I am ſure they fail in this; he does not ſay that he was a priſoner in NEWGATE, and if not ſo he was not within the conuſance of the gaol-delivery; it is only ſaid that he was in the ſheriff's cuſtody, and that he might be and in THE COMPTER, or the ſheriff's houſe; and this was allowed error in miſtreſs *Celliar's caſe* in this court.

FOURTHLY, They ſay the inquiſition was taken by the Coroner of *London*, and that *ſuper viſum corporis*, and do not ſay in what county; they ſay "in the pariſh of *St. Sepulchre's*, in the ward of *Farringdon* without

(*p*) 4 Co. 44.

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"*London*," but that is only a deſcription of the ward, and do not ſay *in*, *infra*, *de*, or *ejuſdem civitatis*; they ſay *London* in the margin, but there is no reference thereto: now no indictment can be aided by intendment, ſo that the defendant could not be hanged on the ſuit. My client hopes that the preſent defendant will on this; wherefore I pray the judgment for the appellant.

* [393]

HOLT *for the defendant* argued, * That at common law where a bare conviction was a bar, an *auterfoits convict* was always reckoned a good plea, and this ſtatute comes and takes away ſuch pleas, unleſs in caſe of clergy, &c. and that the deſign of the ſtatute was to ouſt appeals in all ſuch caſes where benefit of clergy lay; and here the party did what he could; it was not his time to pray it till called upon by the Court to receive judgment, then he is to pray his clergy, which is the cauſe he ſhews why judgment of death ſhould not paſs againſt him; and ſo are the entries *ſuper quo*, *&c.* And he inſiſted on *Holcroft's caſe*, 4 *Co.* 45.; and ſo he prayed judgment for the defendant.

THE COURT. It is a point of difficulty and novelty, and yet of great conſequence, and fit to be argued again:—and ſo no opinion delivered.

But afterwards in the caſe of *Goring v. Deering*, by eleven judges at *Serjeant's-Inn*, there was judgment for the plaintiff upon the ſame plea, and by all held ill, and that the appeal lay, it being brought before clergy allowed. (*q*)

(*q*) But ſee now the caſe of Armſtrong v. Liſle, Mich. Term, 8 Will. 3. Kely. Rep. 89 to 108, where it was adjudged upon great deliberation, that a conviction of manſlaughter on an indictment of murder and the prayer of clergy thereupon may be pleaded in bar of an appeal of the ſame death, whether ſuch prayer were made upon the party being called to judgment or not. S. C. Skin. 670. S. C. Carth. 394. S. C. 1 Salk. 61. 2 Hawk. P. C. ch. 36. ſ. 14. and in the caſe of Smith v. Taylor, Trinity Term, 11 Geo. 3. where, on the point determined in the caſe of Goring v. Deering, 3 Mod. 156, LORD MANSFIELD and the whole Court were of opinion that the queſtion was to be conſidered as ſettled by the caſe of Armſtrong v. Liſle; and that the Court ought, on a conviction of manſlaughter on an indictment of murder, to call the priſoner to judgment. 5 Burr. Rep. 2798 to 2801.

The Thirty-ſixth of Charles the Second,

IN

THE KING's BENCH.

Sir GEORGE JEFFERIES, *Knt. Chief Juſtice.*

Sir FRANCIS WYTHENS, *Knt.*
Sir RICHARD HOLLOWAY, *Knt.*
Sir THOMAS WALCOT, *Knt.*
} *Juſtices.*

Sir ROBERT SAWYER, *Knt. Attorney General.*

Sir HEANAGE FINCH, *Knt. Solicitor General.*

Halter *againſt* Whitfield and another. Caſe 358.

IN a cauſe commenced in an *inferior court*, if iſſue be not joined within ſix months after appearance, the cauſe ought not to be removed by *habeas corpus*, a ſpecial return being made there of by virtue of the ſtatute 21 *Jac.* 1. *c.* 23. And this was agreed by THE COURT on debate in this cauſe, a complaint being made againſt *Mr. Staples*, the ſteward of Windſor. *Vide ante, caſe* 352.

In an inferior court, if iſſue be not joined in ſix months after appearance, the cauſe ought to be removed.
Tidd's Pract. 173.

See 19 Geo. 3. c. 70.

Dyke *againſt* Mercer. Caſe 359.

Trinity Term, 36, *Car.* 2. *Roll.* 514.

DEBT on a bond. The caſe was, that two men were bound in a bond to J. S.; the defendant pleads that his co-obligor was ſued to judgment; and thereupon a *fieri facias*; and that the money was levied by the ſheriff: the plaintiff demurs.

To debt on bond againſt one obligor a PLEA of judgment recovered againſt the other is bad; for a co-obligor cannot plead any thing but ſatisfaction.

DYER v. MERCER.

MR. TRINDAR *for the plaintiff* argued, That it was not a good plea, there being no *ſatisfaction*, and inſiſted much on the caſes of one of the obligor's being in execution *ad ſatisfaciendum*, that that was no plea for the other obligor; he cited *Bro. tit.* "*Execution*," 132. 145. 1 *Roll* 196. and ſaid, that perhaps the ſheriff may prove inſolvent, or may be robbed of the money, and the plaintiff be never * [395] * ſatisfied.

And by THE WHOLE COURT judgment was given for the plaintiff, that the plea was naught: and a difference was taken between where a *ſcire facias* or debt is brought on the judgment againſt the party himſelf, for there ſuch a plea may be good, for he ſhall not pay twice; but a co-obligor can plead nothing but *ſatisfaction* actually made of the debt: ſee and peruſe the caſes of *Rookes v. Wilmore*, *Savil Rep.* 123. *Cro. Eliz.* 238. 390. 4 *Leon.* 150. *Cro. Car.* 75. *Hob.* 89. 2 *Bulſt.* 97. 5 *Rep.* 86.

Caſe 360. Dannet *againſt* Collingdell.

Treſpaſs muſt ſhew property in the plaintiff. Lutw. 485. 2 Lev. 20. 156.

TRESPASS for taking and carrying away *averia ipſius quer.* VIZ. *unum equum*, &c. NECNON *unum galerum* ANGLICE one *hat*.

MR. HOLT after verdict moved in arreſt of judgment, that as to *the hat* there is no property laid in the plaintiff.

And judgment was ſtayed.

Caſe 361. Lock *againſt* Crayton.

Variance.

IN action of account, iſſue was joined on *plene computavit*, but the *jurata* and *diſtringas* were *de placito debiti*; AND HELD naught, for that is the only warrant for the judge to try it.

Caſe 362. Lane *againſt* Hawkins.

A deviſe of "all "my other "eſtate of what "nature ſoever "to my execu- "tors to pay debts "and legacies "therewith," paſſes the inheritance. Vide ante, caſe 336. 35. 71. 116. 1 Lev. 130. S. C. Ante, 328. 1 Salk. 237. 2 Ld. Ray. 1324. 2 Wilſ. 524. 3 Peer Wms 295. 2 Burr. 880. 3 Com. Dig. "Deviſe," (N. 4.) 2 Bac. Abr. 55. Cowp. 299. Dougl. 734. 1 Term Rep. 411. 1 H. Bl. Rep. 225. 2 Term Rep. 656. 3 Term Rep. 356. 4 Term Rep. 89.

EJECTMENT on a deviſe, *viz.* "All other my eſtate of what "nature ſoever I give to my wife *Joan*, whom I make my exe- "cutrix, to pay my debts and legacies therewith."

It was argued, that this could not paſs *a fee*, from the caſe of *Wilkinſon v. Merryland*, in *Cro. Car.* 449. which caſe is differently reported from 1 *Rolle's Abr.* 834. and *Crook's Report* is according to THE ROLL, wherein it was adjudged, that the word "*Eſtate*" paſſes only an eſtate *for life*.

Mr. POLLEXFEN *è contra*. The words are comprehenſive enough to paſs the copyhold inheritance, and the * reaſon given in the caſe

of *Wilkinſon v. Maryland* is, becauſe the word "*Eſtate*" comes in the midſt of perſonalities, as *goods* and *chattles*; beſides, there it is "whereof I am *poſſeſſed*," which reaches only to *goods* or *terms for years*, and not to *lands* of which a man is ſaid to be *ſeiſed*. The caſe of *Johnſon v. Finner* (*a*), and in *Wilſon v. Robinſon* (*b*), the words, "all my tenant-right eſtate" paſſed a fee: ſo the caſe of *Bowman v. Millbanks* in this Court (*c*), where the words were, "I give all to my mother:" becauſe that was ſo general and uncertain, they adjudged that it reached not the land, but TWISDEN *Juſtice*, thought otherwiſe even in that caſe: here was the caſe of *Reeve v. Winnington* (*d*), "I hear that my couſin *John* is enquiring after "my death, but it ſhall be in vain, therefore I give *all my eſtate* to "my wife;" and it was held that it extended to lands, and carried a fee (*e*). Beſides, here was in our caſe *a ſurrender* to the uſe of his laſt will, which ſhews his intention, and if this be not good the land will go to his heir contrary to his intention and expreſs declaration.

And judgment was for the defendant that the inheritance paſſed.

(*a*) Johnſton v. Finner, 1 Roll Abr. 834.
(*b*) 1 Mod. 100.
(*c*) 1 Lev. 130. 1 Sid. 191.
(*d*) 3 Mod. 45. S. C. 2 Show. 249.
(*e*) Ante, 328.

Pinfold *againſt* Kide. Caſe 363.

DEBT on a bond with condition *parare mandatis eccleſiæ*; where, on a ſpecial pleading and demurrer, there were two queſtions.

The eccleſiaſtical courts are the king's courts.

FIRST, Whether the eccleſiaſtical courts in *England* ought to be held in the king's name?

And as to that MR. POLLEXFEN urged a hundred years uſage, and the opinion of all the judges in *England* in *King James*'s time, and cited 2 *Inſt.* 685. 12 *Rep.* 7.

SECONDLY, If ſuch bond be good? He cited *Fitzherbert* (*a*), that they might take *caution*, which is the ſame with *bail*, *ſecurity*, or *pledge*; and in *Minſhaw's Dictionary*, "caution" is put for "ſecurity" or "pledge;" and they may take a pledge, *Dr. Cozme* ſays (*b*), that *caution* is taken out of the civil law, and the judge is not bound to take the *cautio juratoria* without ſome other ſecurity, as pledge, or the like, unleſs he that ſwears cannot give the other; though the book does not uſe the word * "ſurety," but only "*cautio pignoratoria*," but he ſays afterwards "with ſurety:" Surety means obligation with ſureties, as in the writ *de ſecuritate pacis*; they cannot take recognizances but they may take bonds; and ſo do the court of admiralty take bonds, which they call "ſtipulations," *Cro. Eliz.* 685. 19 *Hen.* 6. 1. *Pane v. Evans*, *Trin.* 25 *Car.* 2.

A bond with condition *parare mandatis eccleſiæ*, is good.

* [397]

(*a*) Fitz. N. B. 63.
(*b*) Coſme's Apology, page 12, 13.

PINFOLD v. KIDE.

The court of admiralty may and do take bonds in lieu of bail, and ſhall not be prohibited. *Greenwood v. Baker*, *Godb.* 260. the prohibiting of bonds for diſtribution was upon the account of the matter or condition of them, not for the form or bond itſelf: all courts, unleſs they have ſome way or means of putting juſtice in execution are in vain: if they deny this they muſt allow us ſome other way: there is no more harm in making theſe bonds to the judge or officer, than in bail-bonds to the ſheriff.

MR. ROTHERAM *for the defendant.* He waived the firſt point, and inſiſted only that the bond is void (*c*). The bond of caution ought to be in the king's name; it is a public ſecurity. The caſes MR. POLLEXFEN urged of bail-bonds to the ſheriffs and gaolers, are but private ſecurities againſt eſcapes: here *Dr. Pinfold* may releaſe this bond, and if he die it will go to his executors; and he cited the opinion of FLEMING *Chief Juſtice*, in Eaſter term, in the ninth year of *James the Firſt* (*d*); and the caſe of the *Biſhop of Exeter v. Star*, in the court of King's Bench, in Trinity term, in the twenty-fifth year of *Charles the Second* (*e*), where LORD HALE and the reſt of the court adjudged ſuch bond void; ruling that it ought to be in the king's name.

JEFFERIES *Chief Juſtice.* Bonds to ſheriffs are for the more ready compliance with the methods of juſtice; and the practiſe for theſe hundred years in moſt of the eccleſiaſtical courts in *England*, has been ſo: they are the king's courts. If they may take a pledge they may meddle with a temporal thing: and if they are truſted with a pledge, why not with a bond? And it would be ſtrange to conſtrue a bond void for the ſake of a condition, which is legal.

Judgment for the plaintiff.

(*c*) Lambard's Saxon Law, 183. Regiſter, 66, 67.
(*d*) 1 Bulſt. 122.
(*e*) Roll 925 a 975. it is in 3 Keb. 219. 283.

Caſe 364.
* [398]

* Edwards *againſt* Roades.

Trinity Term, 35 *Car.* 2. *Roll* 1092.

A plea, by bail, that the *principal* rendered himſelf in diſcharge, muſt ſay *prout patet per recordum.*
Latch. 149. Jones, 138. Hob. 116.

IN ſuit againſt the bail, they plead that the defendant rendered himſelf in execution in diſcharge of his bail, and do not ſay *prout patet per recordum.*

By ſome the difference is that where a man renders himſelf, and the court commits him, it is matter of record; but that where he renders himſelf without a commitment, then it is matter not of record, but *pais*, *Moor*, 188.

By ſome all renders ought to be upon record, as a *comperuit ad diem*,

diem, *Moor*, 888. *Moyle's Entries*, 42. *Hob.* 210. a render may be *in exoneration. manucaptor.* and yet not in execution.

EDWARDS v. ROADES.

And ſo was this caſe at the bar.

MR. DARNEL and MR. GOODING were counſel in the cauſe.

Stocker and his Wife *againſt* Edwards. Caſe 365.

Eaſter Term, 36 *Car.* 2. *Roll* 120.

EJECTMENT. The caſe was, a ſurrender of a copyhold-tenement was made to the uſe of himſelf for life, and after to the uſe of *John* his youngeſt ſon, and the heirs of his body, *if he attain* to the age of eighteen years; and if he die before he attain to that age without iſſue male, then to his right heirs.

In what caſe a remainder ſhall veſt immediately.

1 Eq. Abr. 195. 2 Atk. 304. 1 Burr. 228. Fearne, C. R. 4 edit. 372. 413. 3 Term Rep. 41.

The queſtion was, Whether this was a *contingent remainder*, or whether it ſhould attach immediately upon the death of tenant for life?

AND IT WAS HELD that it attached immediately, becauſe of the intention of the party; and held to be the ſame with *Sir Julius Cæſar's caſe*, in *Jones*, 389.

* Randal *againſt* Breeſe. Caſe 366.

Eaſter Term, 34 *Car.* 2. *B. R. Roll* 609.

* [399]

WRIT OF ERROR on a judgment in the court of Common Pleas (*a*), where debt was brought for rent reſerved on a leaſe of *copyhold* and *freehold* lands; and the defendant pleaded in bar, that he was evicted out of all the ſaid lands *ante*, &c.; and the plaintiff replied, that another perſon was ſeiſed of the *freehold*, and traverſes the *ſeiſin* which was alledged by the defendant in his plea of eviction: upon this an iſſue is joined, and found for the plaintiff, and a general judgment given for the plaintiff.

In debt for rent on a leaſe of *copyhold* and *freehold* lands, if the defendant plead *eviction* from all the lands in bar; and the plaintiff reply that another perſon was ſeiſed of the *freehold*, and traverſe the ſeiſin alledged in the plea, a *general verdict* for the plaintiff is good.

And the error aſſigned by MR. POLLEXFEN was, that here did appear a title to the plaintiff but for half the rent, for it ought to be apportioned; and the plaintiff in his replication has anſwered only as to part. The defendant has alledged all that was neceſſary for him to alledge: the plaintiff ought particularly to ſet forth how much: and he cited *Pollet's caſe* (*b*), in replevin; the caſe of *Ewer v. Moyle* (*c*), and *Smith v. Malines* (*d*).

1 Salk. 4. 94. 179. 3 Lev. 55.

MR. HOLT *è contra*. The judgment is well given, for the apportionment ought to have come on the defendant's part: if the de-

(*a*) See the caſe in the Common Pleas, 3 Lev. 39.
(*b*) 1 Brownl. 186.
(*c*) 3 Cro. 711. 771.
(*d*) Cro. Jac. 160.

RANDAL v. BARKER.

fendant make one entire bar, and we falſify it in any one part, the whole is avoided, as if for part it had been ill pleaded: to plead in bar to the whole rent cannot be a plea of an apportionment; for in that caſe the defendant ought to ſet forth the value of the particular lands evicted, and ſo of the other lands: he cited the caſe of *Hadſkin v. Tornborough* (*e*), where the caſe was; A. lets his houſe in *London* to J. S. for forty pounds *per annum* rent, for twenty years, and afterwards takes a re-demiſe, for a leſs term, of the ſtable, and held no ſuſpenſion of the rent, contrary to the *caſe of Rawlins* (*f*), and there LORD HALE put this caſe of a landlord of a houſe in *London*, who leaſes it to a tradeſman, who lets lodgings, and afterwards
* [400] the landlord rents * one of the chambers for a year, whether this ſhould be a ſuſpenſion? No ſurely, nor ſo much as an apportionment. Then he argued ſtrongly from the authorities which MR. POLLEXFEN had cited of *replevins* and *overwries*, that the apportionment ought to come on the defendant's part: theſe caſes proving plainly that it ought to come on the part of the plaintiff in the replevin in his replication, and that the avowant need not ſet it forth, he is only to make a demand of his whole rent, and the defendant in an action of debt is the ſame with the plaintiff in a *replevin*: then he argued, that if it were a fault, it was helped by the ſtatute of Jeofails, in 32 *Hen.* 8. *c.* 30. there being a verdict for the plaintiff; and he cited the caſe of *Lovelace v. Grimſden*, *Cro. Eliz.* 229.

THE COURT. Where the plea in bar is entire, and part is falſified by the verdict, the plaintiff ought to have his judgment general: it could not be otherwiſe done on the plaintiff's part, for he demands twenty pounds in his declaration, and it would have been *a departure* in him to require but ten pounds in his replication, as he muſt if he had ſet forth the ſeveral values and the apportionment.

And THE LORD CHIEF JUSTICE remembered the caſe of *Jefferyes v. Day*, in debt againſt executors, who pleaded ſeveral judgments, and the plaintiff replied fraud in one, and found ſo, and there held the verdict was for the plaintiff: ſo this is found for the plaintiff; and the ſame would be if one of the judgments were ill pleaded, *Edgecombe v. Dee*, in *Vaughan's Rep.* 89. (*g*.)

Judgment affirmed by the whole Court.

(*e*) Adjudged in Michaelmas term, the 27 Car. 2. in the King's Bench, and entered in Eaſter term, 27 Car. 2. Roll 514; it is reported in 3 Keb. 500. 541.

(*f*) Rawlins v. Somerford, 4 Co. 52.

(*g*) Same caſe under the name of Seaman v. Day, 1 Lev. 281. 2 Lev. 39. 1 Vent. 198. 2 Keb. 860. 3 Keb. 15.

The

The King *againſt* Vicaries. Caſe 367.

INDICTMENT againſt him (being A QUAKER in *Briſtol)* on 35 *Eliz. c.* 2. and *not guilty* pleaded, and verdict againſt him, that he ſhould be committed for three months without bail or mainprize, according to the tenor of the act: a writ of error was brought.

The *quarter ſeſſion* has no authority by 35 Eliz. c. 2. to proceed againſt *quakers* for not going to church.

MR. POLLEXFEN aſſigned theſe two errors:

FIRST, The ſtatute that creates this offence does not give the *quarter ſeſſions* any power over this matter; this is an offence whereby his liberty and eſtate is ſubject to a forfeiture; it is none of thoſe offences of * not *coming to church*, or *going to conventicles*, of which they have juriſdiction, and no ſtatute giving them power they can have none; ſo that it is all *coram non judice.*

* [401]

THE COURT inclined that they had no authority, but would not deliver any opinion. For,

SECONDLY, The indictment was, that the thirtieth of *December* he was of the age of ſixteen years *et amplius*, and did abſtain from going to church *per ſpatium unius menſis ante tunc tempus elapſ.* which is naught, for the offence is, "if any one being of the age of "ſixteen years, ſhall obſtinately abſtain from, &c." So that it muſt be *after* he is of the age of ſixteen years.

An indictment on 35 Eliz. c. 2. muſt ſtate that the offence was committed *after* the offender had attained ſixteen years of age.

Which exception THE WHOLE COURT allowed as fatal; and the judgment was reverſed.

Pidgeon *againſt* Pitts. Caſe 368.

DEBT on a bond, whereon the caſe was thus: The obligor makes the obligee his executor, and dies; the executor dies, and leaves the plaintiff his executor, who brings debt on this bond againſt the defendant as heir of the obligor.

If an *obligor* make the *obligee* his executor, the *executor of the obligee* may bring debt againſt the *heir of the obligor.* Co. Lit. 264. Plow. 184.

And PER TOUT LE COURT held good; for the debt is not extinguiſhed, but only ſuſpended as to the executor.

And judgment was given for the plaintiff (*a*).

(*a*) See Dorcheſter v. Webb, Cro. Car. 372. S. C. Jones, 345. S. C. Hutt. 128. Fryer v. Gildridge, Hobart, 10. Wangford v. Wangford, Salk. 299; and ſee the caſe of Rawlinſon v. Shaw, that if a debtor make his creditor and another perſon executors, *the creditor*, if he neither proves the will, nor acts as executor, may maintain an action againſt the other perſon for his demand on the teſtator. 3 Term Rep. 557 to 560. and Cary v. Goodinge, that making a debtor executor is no extinguiſhment of *the debt* in equity. 3 Brown's C. C. 110. Brown v. Selvin, Forreſter, 240; but parts with the action only.

Poole,

Caſe 369. Poole, AN ATTORNEY, *againſt* Archer.

Trinity Term, 36 *Car.* 2. *Roll* 730.

A leſſee is liable on a covenant to repair, although the houſe be burned down.
S. C. Skin. 219.

COVENANT on the common covenant for reparations, &c. in the leaſe of a houſe in *St. Clement*'s pariſh. The breach aſſigned was, that the houſe fell to the ground ſuch a day; the defendant pleads, that true, the houſe was burned down by caſualty ſuch a day, and that the plaintiff entered the next day and evicted him, and *adhuc extratenet*; *unde* he could not repair it: the plaintiff demurs.

* [402] * MR. NELD, *for the plaintiff*, took divers exceptions to their plea, as, that they did not ſay, that he entered without cauſe; have not traverſed the fall to be for want of repairs: The queſtion is, whether an action lies on a fire happening without allowing time to repair it? He cited *Dyer*, 35. 324. and the caſe of *Cornwallis v. Hamond*, *Latch.* 226. and *Palmer*, 416.

ANOTHER EXCEPTION he took was, becauſe it ſays "a meſſuage burned down," and yet he pleads an entry into "the meſſuage aforeſaid."

MR. HOLT as to that exception anſwered, that there is not ſo much *certainty* required in pleading as there is in writs: it is ſaid that he entered into the thing demiſed.

As to the other exception the action is for not repairing: the allegations of things before their time need not be traverſed, although they afterwards become material: the queſtion will be, whether a houſe being caſually burnt down be a breach of covenant of itſelf, though the houſe be rebuilt? I conceive it is not, and an entry before is a good plea in bar, for we could not rebuild it, he entering the next day. On a covenant not to do waſte; permiſſive waſte is no breach of the covenant, if by a ſtranger (*a*), though it be within the *ſtatute of Glouceſter*: in rebuilding, the honeſty of the agreement is performed: now their entry ſuſpends the action, if it be ſuch a covenant as goes along with the land and is not collateral: there is the ſame reaſon for a covenant as for a condition. *Spencer's caſe*, 5 *Co.* 16. The covenant goes with the land, that is for reparations; as a covenant to build on the land. *Moor*, 402.

THE COURT. There was the caſe of *Coke v. Forth*, a conſtruction of waſte by improvement: firſt the houſe falling down, there is an action ſurely attached; and if debt be brought for half a year's rent, and you come and plead an eviction before the half year was out, this will not avoid the quarter's rent, becauſe, for that, the action was attached.

(*a*) Roll Abr. title "Condition," 427, 428.

MR.

MR. POLLEXFEN. Suppoſe the leaſe of a houſe for twenty-one years, and the houſe is burned down the day before the leaſe expires, ſhall not the covenant be broken? Yet it cannot be rebuilt within the term, for his intereſt is determined and gone. POOLE v. ARCHER.

ALL THE * COURT inclined that the action was attached, and the entry therefore could not be a ſuſpenſion. * [403]

And the next term JUDGMENT was given for the plaintiff (*b*).

(*b*) See Paradine v. Jane, Allen, 26. S. C. Stiles, 46. Compton v. Allen, Stiles, 162. Cheſterfield v. Boulton, Comy. Rep. 630. Monk v. Cooper, 2 Ld. Ray. 1477. S. C. 2 Stra. 763. Belfour v. Weſton, 1 Term Rep. 310. Doe v. Sandham, 1 Term Rep. 710.

Rockelley *againſt* Godolphin. Caſe 370.

Michaelmas Term, 34 *Car.* 2. *Roll* 211.

DEBT on a bond againſt the defendant as adminiſtrator, *durante minore ætate*, &c. who pleads, that the teſtator ſealed a bond to A. B. of ſix thouſand pounds penalty, with condition to pay three thouſand pounds to his wife, if ſhe ſurvived him, within ſix months after his deceaſe; and that ſhe was wife and adminiſtratrix; and that ſhe had aſſets to one thouſand pounds *et non ultra*; and that theſe aſſets ſhe retained in ſatisfaction of the ſaid debt; *et petit judicium*, &c. The plaintiff demurs.

An adminiſtrator, *durante minoritate*, may retain aſſets to pay a bond given by the inteſtate to truſtees, conditioned to pay the adminiſtratrix ſo much money if ſhe ſurvived him. S. C. Ray. 483. S. C. Skin. 214.

MR. POLLEXFEN *for the plaintiff* argued that the plea is naught, becauſe the bond was not to her; the debt or duty was not to her, but to A. and B.; and after breach of the condition the forfeiture belonged to them.

MR. HOLT *è contra*. And he inſiſted much upon this, that the bond was to her uſe, and that they were but truſtees for her, and by the conviction the money was payable to herſelf, and he cited 2 *Edw.* 4. 2, 3. Then he diſtinguiſhed between this caſe where the condition makes it payable to her, and where it is payable to the obligee, though in truſt for her, for the reaſon of retainer is not upon the account of the extinguiſhment of the debt, but upon this account, that the money was to be paid to the ſame party, and cited 1 *Cro.* 362. 1 *Roll. Abr.* 525. She cannot pay money to herſelf; and if the obligee ſhould bring an action againſt her, ſhe might plead that ſhe had ſo much money in her hands of the teſtator's; what muſt ſhe tell it over with one hand, and pay it with the ſame to the other? If there had been another executor, and he had paid it to her, that would have been a performance of the condition, and a diſcharge of the debt, and why ſhould it not be ſo here when the law makes a payment? He cited *Hob.* 10. 1 *Cro.* 372. 12 *Hen.* 4. 25. 35. 21. 31. *Fitzh. tit. Bar*, 188. An executor may retain where he never ſhould have * an action; as where he pays any of the teſtator's debts with his 4 Term Rep. 640. * [404]

ROCKELLEY v. GODOLPHIN.

his own money, *Dyer*, 2. *Moor*, 2. and 1 *And.* 24. The obligee muſt bring an action againſt her, becauſe ſhe did not pay herſelf, which is odd; and if ſo, that ſhe cannot retain, it would be a very great miſchief, for it forfeits the penalty, and ſo doubles the charge upon the teſtator's eſtate; and what if ſhe ſays I am paid? And ſo ſhe ſays here: ſhe could not plead it better.

THE COURT inclined all for the defendant, except HOLLOWAY *Juſtice*, who cited a *caſe of Sir Benjamin Bathurſt*, in the Common Pleas, that was the ſame with this, and the contrary opinion held there:—So *quære*, for ſome at the bar denied the caſe to be as this was, but that there the money in the condition was payable to the truſtees, which is different.

Adjournatur (*a*).

(*a*) Afterwards in Hilary term, 36 & 37 Car. 2. judgment *niſi* was given for the defendant. S. C. Skin. 215; and ſee the caſe of Loane v. Caſey, 2 Bl. Rep. 965. that a marriage covenant with a truſtee for ſecuring a proviſion for the wife, may be given in evidence by her on a plea of *plene adminiſtravit* in an action brought againſt her as executrix; and ſhe may retain ſo much out of the perſonal affets as is equal to the damages ſhe has ſuſtained by the breach of ſuch covenant.

Caſe 371. Court and his Wife *againſt* Weſt.

Trinity Term, 36 *Car.* 2. *Roll* 353.

A declaration as *adminiſtratrix* of the goods of A. ſtating that A. died inteſtate *ut dicitur*, is good; for *ut dicitur* may be rejected as ſurpluſage.

DEBT on a penal bill, brought as adminiſtratrix of the rights, goods, and chattels of J. S. who died inteſtate, *ut dicitur*; then alledges that letters of adminiſtration were committed to him by, &c.

Exception was taken thereto, becauſe of the "*ut dicitur*," which was ſaid to make it uncertain, whether the party died inteſtate; for the plaintiff has no cauſe of action, no right of action, but as adminiſtrator; and therefore he ought poſitively to entitle himſelf thereto, which he is not, unleſs J. S. died inteſtate. It is true, in caſe of the defendant being an adminiſtrator, the plaintiff may only ſay *adminiſtratore J. S. qui obiit inteſtat. ut dicitur*, becauſe there he cannot know it certainly.

But THE COURT ſeemed to be of opinion that it was well enough, for without that word it is right; and then they would intend that he died inteſtate, otherwiſe the court-chriſtian would not have granted letters of adminiſtration: beſides, ſuppoſing that there be a will, the letters of adminiſtration ſtand good till the will appear to be proved.

Ruled that *ulterius moveatur*.

Friend

* Friend *againſt* Bouchier.

Caſe 372.

Trinity Term, 34 *Car.* 2. *Roll.* 920.

* [405]

EJECTMENT. Deviſe to *Dorothy Hopkins*, and after her deceaſe to the firſt, ſecond, third, &c. ſons ſucceſſively, and the heirs males of their bodies. In witneſs whereof, &c. Then A MEMORANDUM was endorſed, "That the within named *Dorothy* "ſhall not alien the lands from the heirs males of her body, but "upon default of ſuch iſſue it ſhall remain over."

On a deviſe "to A. for life, "with remainder to her "ſons ſucceſſively, and the "heirs male of "their bodies," with A MEMORANDUM indorſed on the will, "that the "ſaid A. ſhall "not alien the "ſaid lands "from the heirs "male of her "body, but that "upon default "of ſuch iſſue "it ſhall remain "to B. in fee." —A. ſhall have an *eſtate for life* only, and not an *eſtate in tail* by implication; for the *memorandum* explains the intention of the teſtator.

The queſtion was, Whether ſhe ſhould have an *eſtate in tail*, or only an *eſtate for life?*

And it was argued, that it ſhould be an eſtate tail; for although the limitation of the eſtate be full and expreſs to the heirs of the body of the ſons of *Dorothy Hopkins*, yet they are words that admit a limitation, and, in a will, an eſtate may be limited by implication, 35 *Aſſiſe*, 14. Subſequent words may reſtrain, and limit, and declare, and explain the precedent ones. *Altham's caſe*, 8 *Co.* 138. If he had given it "to one and his heirs, provided that if he die without iſſue "male, &c." this would have created an eſtate tail.

MR. GILES EYRE argued *è contra*, that it is but an eſtate for life, and cited 1 *Cro.* 368. 2 *Leon.* 226. *Higham's caſe*, 2 *Roll. Rep.* 21. If this clauſe gives any thing it would give her a power to alien inſtead of reſtraining her: his meaning was not to alter the eſtates, but to prevent the alienation if he could: the intent governs the words, and not the words the intent, *Dyer*, 357. 375. He cited the caſe of *Atkins v. Atkins*, 3 *Cro.* 248. *Moor*, 593. *Tuck v. Frencham*, *Moor*, 113 & 124. *Claxton v. Glazier*, *Dyer*, 330.

S. C. 1 Eq. Abr. 184.
S. C. Skin. 240.
S. C. 3 Mod. 81.
S. C. Pollexf. 657.
2 Vern. 520.
2 Bac. Abr. 60.
Cowp. 324. 410.
3 Term. Rep. 83. 4 Term. Rep. 605.

THE COURT inclined that ſhe had an eſtate tail, and that the teſtator intended an eſtate tail to her, otherwiſe he would never have thought ſhe had any power to alien.

Adjournatur (*a*).

(*a*) The caſe was again argued in Eaſter term, 1 & 2 Jac. 2. and judgment given for the defendant, S. C. 3 Mod. 83. the whole Court being clearly of opinion that *Dorothy* had only an eſtate for life. S. C. Skin. 240. S. C. 1 Eq. Abr. 184.

Caſe 373.

* [406]

The court of King's Bench will not, after ſentence, grant a prohibition to the admiralty, on the application of *the plaintiff* in the court below to ſtay his *own ſuit*, although the libel is founded on the conſtruction of *letters patent*.

2 Inſt. 602. 607.
2 Roll. Abr. 312.
Moor, 780.
Cro. Eliz. 55.
2 Show. 173.
3 Mod. 286.
2 Burn. 813.
Stra. 576.
1 Term Rep. 552.
2 Term Rep. 473.
6 Com. Dig. "Prohibition," (E.)

* Browne *againſt* Walker.

PROHIBITION prayed to the court of Admiralty by *the plaintiff*, who had libelled againſt the defendant there, and the cauſe had had a whole year's tranſaction.

The ſuggeſtion was, that the ſuit there (which was his own) was on the king's *letters patents*, the conſtruction whereof belong to the common law judges; and the ſame made at land, &c.

And a prohibition was denied by THE WHOLE COURT.

MR. HOLT offered to cite the caſe of *Worts v. Clyſton* (*a*), which was a ſuit in the ſpiritual court for tithes, by virtue of a leaſe from the vicar for three years, and the defendant claimed to be diſcharged by a former leaſe and compoſition by deed; and the Court held, that the plaintiff himſelf might have a prohibition to ſtay proceedings there, for they are not to meddle with the trial of *leaſes* or *real contracts*; although they have juriſdiction of the original cauſe, *viz.* tithes; *et non refert*, if the plaintiff himſelf prays the prohibition to ſtay his own ſuit; for if this Court has knowledge, by any means, that the ſpiritual court meddles with any temporal trials, they ought to grant a prohibition.

But THE COURT denied a prohibition without hearing his authorities, for that his client had commenced the ſuit himſelf; and now when he finds the Court inclined againſt him, then a prohibition muſt be had to ſtay all, and the defendant ſhall have no coſts for all his trouble and charge there: and ſo would it be if a man ſhould bring an action in the ſheriffs court in *London*, for a cauſe ariſing at *Exeter*, and go on till he ſee if he can get his ſuit there; if not, then for a prohibition.

THE LORD CHIEF JUSTICE. Sure.y we will never grant a prohibition in ſuch a caſe to ſtay your own ſuit.

Tamen quære, For it ſeems that if any perſon as *amicus curiæ* ſhould inform the court of any uſurpation of a new juriſdiction by the eccleſiaſtical court, or * in any inferior court, that in ſuch caſe a prohibition is grantable.

* [407]

(*a*) Cro. Jac. 350. The ſame caſe is in 1 Roll. Abr. "Prohibition," page 306.

Palmer *againſt* Allicock. Caſe 374.

Michaelmas Term, 35 *Car.* 2. *Roll* 239.

PROHIBITION. A man dies inteſtate, leaving no wife, but only one child, *viz.* a ſon; who has letters of adminiſtration to the father: the child dies inteſtate, and the next of kin to the child takes out letters of adminiſtration *de bonis non* of the father: the next of kin to the father ſues to repeal theſe letters, &c.

If a man die inteſtate, leaving no wife, and only one child, a ſon, who obtains letters of adminiſtration to his father, and then dies inteſtate, under age, and letters of adminiſtration *de bonis non* of the father be granted to the next of kin of the ſon, the Court will not prohibit the commons from revoking their letters, and granting ſuch adminiſtration to the next of kin of the father.

MR. ROWE *for the defendant* argued againſt the prohibition, that the father's next of kin ought to have it: he urged that the ſtatute of wills 32 *Hen.* 8. *c.* 1. reaches not to children's children, and cited *Sir George Curzon's caſe* (*a*). The faireſt equity in conſtruction is to bring an equal miſchief within the ſame equal remedy. Diſtribution was queſtioned juſt before the act of diſtribution was made (*b*), and the ſtatute 22 & 23 *Car.* 2. *c.* 10. is only to authorize and legitimate ſuch bonds (*c*). Adminiſtration has been carried to the next of kin, though there has been a reſiduary legatee (*d*). A reſiduary legatee is looked upon as *hæres inſtitutus*: this caſe of a ſole child is not within the ſtatute, nor within the miſchief. Where a *feme covert* dies, leaving a huſband, he ſhall have the eſtate (*e*); ſo ſhall the parents of their own child; ſo the child of its parent; and here the child is intereſted accordingly; and ſo the law left as it was found. The caſe of *Newton v. Burnel* (*f*), a ſole child took a mortgage in fee, which in equity is but a chattle; this was in the name of the ſon and another perſon; the jointenant releaſes to the ſon; but the equity being in the father, it being his money, the mortgage was decreed to go to the father's adminiſtrators. Here by this act the property is * not ſo veſted, but he may waive it or alter it: ſuch ſole child ought to have the *reſidue* (*g*).

S. C. Poſt, 486. S. C. Skin. 212. 218. S. C. 3 Mod. 58. S. C. Comb. 14. Ante, 285. Carter, 126. 2 Bac. Abr. 429.

* [408]

MR. POLLEXFEN. The child has ſuch an intereſt as a deviſee of *reſiduum bonorum*, which ſhall go to his next of kin; and the ſtatute gives it to him as much. There is no property veſted in him ſo as to bring trover for it without letters of adminiſtration, but he has a right to have letters of adminiſtration excluſive of any other. In the *caſe of Denne* there was not a reſiduary legatee; he had but a ſpecific legacy, and part of the goods deviſed to him; but where he is full and plenary reſiduary legatee it is otherwiſe; and the reaſon of it is, becauſe it is unreaſonable that one ſhould have the eſtate, and another ſhould have the adminiſtration: now this act comes and ſupplies a deviſe, and gives

(*a*) 6 Co. 16. Dyer, 253. 286.
(*b*) 19 Car. 2. Hughes v. Hughes, in the Common Pleas. 1 Lev. 233. Carter, 125.
(*c*) Slawney's caſe, Hob. 83. Tucker's caſe, Hob. 191. Fotherby's caſe, Cro. Car. 63.
(*d*) Denne's caſe, Cro. Car. 115. Ketley, 105. Jones, 225.
(*e*) See 29 Car. 2. c. 3. ſ. 25. and 1 Mod. 231.
(*f*) In the Exchequer, in 1684.
(*g*) 2 Roll Rep. 158. Hutton, 109.

the

PALMER v. ALLICOCK.

the ſame intereſt that a deviſe would, which carries it to his adminiſtrator.

THE COURT. It is no queſtion but that in caſe of one child, it is within the law as much as where there are ſeveral children; the end of the law was, that all ſhould have it as well as one, and one as well as all; there is no more a veſting here than there was in the one child at common law.

POLLEXFEN. Suppoſe there were two children and one dies, his adminiſtrator ſhall have but one part. Before this ſtatute, if a father had but one child, and he died, the adminiſtration ſhould be granted to the next of kin to the father *de bonis non* of the father, and the child's wife, children, executor, or adminiſtrator ſhould have nothing; but now ſince the act the intereſt goes to the executor or adminiſtrator of ſuch party.

WYTHENS *Juſtice*. There are no words of veſting, but only that ſecurity ſhall be given, &c.; the act ſignifies, and is to be intended as no increaſer of property in any perſon that had property before the ſtatute, but to diſtribute it amongſt thoſe who had no property before.

MR. POLLEXFEN. If a father die inteſtate leaving three children, and all the children die before adminiſtration, ſhall it go to the executors or adminiſtrators of ſuch children?

* [409] * WYTHENS *Juſtice*. I do not ſee that this act alters the adminiſtration at all, but only directs a diſtribution.

MR. POLLEXFEN, in Hilary term following, argued it again.—In caſe of dying inteſtate, the infants have an intereſt veſted by the ſtatute. I do not mean a property in any particular part of the goods, but ſuch an intereſt as a legatee has that dies after the teſtator's death, and before the delivery of the goods, and ſuch as any one has to a *choſe in action*. At the common law there was no wife or child that had any right or intereſt in the inteſtate's eſtate, but the ordinary was the ſole maſter thereof to diſtribute it *in pios uſus*; and perhaps the wife and children might come in under that name (*b*), but no otherwiſe. Then the 31 *Edw.* 3. *c.* 11. gave only an action to the adminiſtrator; and then the ſtatute of 21 *Hen.* 8. *c.* 5. left it in the wife and next of kin by virtue of the adminiſtration (*i*). But, notwithſtanding all theſe, there were many inconveniences before the act 22 & 23 *Car.* 2. *c.* 10. of diſtribution; as that the wife carried away all, and the children were all barred; ſo if the eldeſt ſon being of age had got it: but this act has provided a juſt, good, and ſufficient remedy for theſe miſchiefs, by diſtribution of the inteſtates eſtates. The ſtatute of 21 *Hen.* 8. *c.* 5. ſettled the adminiſtration, but left the eſtate unſettled, only it went with the adminiſtration; but by this act of diſtribution all the eſtate is ſettled, go the

(*b*) 2 Inſt. 398. Plowd. 277. (*i*) Hob. 193. 1 Cro. 62. 202.

adminiſtration

administration whither it will. Until *Slawney's case* (*k*) there were no prohibitions to ſtay ſuits for diſtribution: the intention and meaning of this act was to avoid that miſchief: the title ſhews it an act for the diſtribution or ſettlement of the inteſtate's eſtates: this act does in effect make the inteſtate's will for him: it is probable that the *cuſtom of London* guided, as a precedent for it. If a freeman in the city of *London* die, leaving a wife and child, and the wife dies, her third ſhall go to the executor or adminiſtrator; ſo if the child die and leave an executor, the child's part ſhall go to the executor, but not to the adminiſtrator of ſuch child; for if there be no executor it ſhall go to make up and increaſe *the orphanage-money* * of the other children: ſo that if an intereſt be veſted, in caſe there be a wife and ſeveral children, the next queſtion will be, whether an intereſt be veſted when there is but one child? The objection is, there is no need of that, becauſe the act of 21 *Hen.* 8. *c.* 5. gave the adminiſtration to ſuch ſole child, and conſequently the whole eſtate, and ſo there is no need of any proviſion by the act of diſtribution for this caſe which was provided for before: the title of the act is general, and the ſcope of the act is general, and relates to inteſtates eſtates; the ſpiritual court has no rules of diſtribution that gave any right to the wife or children; but the ordinary made diſtribution *in pios uſus*, and therefore this being a remedial law, ought to have the largeſt conſtruction to include as much as poſſible: then ſuppoſing there be an infant who has an intereſt veſted, whether the adminiſtration ſhall go to the next of kin to the infant, or to the next of kin to the father? Whereſoever the whole eſtate ſhall go the adminiſtration ſhall go; as if a wife die, the huſband ſhall have the adminiſtration, though this be not mentioned within the ſtatute of 21 *Hen.* 8. *c.* 5. or this law: and the reaſon is, becauſe the marriage gave him a kind of intereſt in the eſtate of the wife, and the children ſhall have nothing to do therein, *Ognell's caſe*, 4 *Co.* 51. *Rowe's caſe*, 1 *Cro.* 106. The next caſe is that of an executor, reſiduary legatee dying before probate of the will, the adminiſtration goes to the next of kin to him, and not to the teſtator's next of kin, becauſe the former are to have the benefit, or loſe by the good or ill adminiſtration of the eſtate.

* [410]

JEFFERIES *Chief Juſtice.* The ſon is *quaſi* an executor here in intereſt.

WYTHENS *Juſtice.* Here are no words of veſting in the act, it is only that the ordinary ſhall take bonds for diſtribution, ſo that before diſtribution there is no intereſt veſted in any by this act.

Adjournatur (*l*).

(*k*) 12 Jac. 1. Hob. 83.

(*l*) The Court gave judgment that a *conſultation* ſhould go. S. C. 3 Mod. 58. The reaſon of three judges was becauſe the ſpiritual court had a juriſdiction; and of another, becauſe no intereſt veſted. S. C. Poſt. 486. But ſee Bunhill v. Newton, Comb. 113. the caſe of Brown v. Shore, 1 Show. 2. 25. 1 Peer Wms. 46. 2 Peer Wms. 441. 1 Brown's C. C. 303.

Caſe 375.

* The King *againſt* Roſſewell.

THE DEFENDANT was indicted for *high treaſon* for *words ſpoken* in a ſermon at A CONVENTICLE in *Surry*, and being tried here at THE BAR was convicted, and being brought up to receive judgment.

He offered, in ſtay of judgment, that the indictment was for treaſon, in compaſſing and imagining the king's death; and that in order to perfect and accompliſh his ſaid wicked and treaſonable intentions, he ſpoke theſe words: "If we ſtand to our principles we "ſhall beat our enemies, INNUENDO *dictum dominum regem*," without ſaying that he ſpoke of the king: "we have had two wicked "kings, &c. You flock to the king under the pretence of healing "the evil, but it is we only that by our prayers, &c."

And THE COURT conceiving ſome weight in the objection, aſſigned him counſel, *viz.* MR. WALLOP and MR. POLLEXFEN.

MR. WALLOP. The words, as they ſtand in themſelves, diſcharged of the *innuendos*, and in bare ſpeaking, do not bear any treaſonable intention: now if the words *ex vi termini* import not a treaſonable intent, an *innuendo* cannot make them ſo: no *innuendo* can warrantably be inſerted to explain the meaning of words, unleſs there has been ſome diſcourſe of the perſon before, to whom the words may be referred by an *innuendo*, or explication; and *populus ligeos dict. domini regis* INNUENDO is naught, becauſe "the people "of *England*" were never named before (*a*). The office of an *innuendo* is to expreſs and deſign the ſame perſon, which was named before (*b*). An *innuendo* cannot give an original certainty (*c*): before the laſt words there is no mention made of *enemies* to any body; and in this fatal place to put ſuch a weighty matter of fact as his intention upon an *innuendo* is very hard: *in dubiis et generalibus benignior ſententia ſemper præferenda eſt* (*d*).

MR. POLLEXFEN. Though the ſtatute of 25 *Edw.* 3. *c.* 2. ſays, "That treaſon ſhall be declared by an *overt-act*," yet I think *words* may be an *overt-act*, and what thoſe words * are or muſt be is the queſtion? *Pyne's caſe*, *Cro. Car.* 125. As the firſt branch in 13 *Car.* 2. *c.* 1. (*e*) ſhews what is treaſon, ſo does the ſecond branch ſhew what is not ſo, by impoſing other penalties: Firſt, theſe words, "of flocking to the king to be cured of the "evil," they do not come up to this crime: the next words are theſe, "We have had two wicked kings together;" then come to the laſt words, "*et ſi ipſi ad fundamentalia permanerent, &c.*" If theſe words do not relate to our king and government, they are not treaſon; and if theſe ſecond words do not expreſs what *reges* are

* [411] An indictment for treaſon for *preaching* theſe words, "We "have had two wicked kings," INNUENDO, *Charles the Firſt and Charles the Second*, "but "if we," INNUENDO, *the people*, "ſtand to our "principles, we "ſhall beat our "enemies," INNUENDO, *the king and his loyal ſubjects*, is bad; for as the words, diſcharged of the *innuendos*, do not import a treaſonable intention, they cannot be rendered treaſonable by *innuendos*.
S. C. 3 Mod. 52.
S. C. 3 St. Tr. 999.
S. C. 6 St. Tr.
Aſſ. 48.
Cro. El. 497.
Hob. 2, 3. 45. 468.
Hut. 65.
All. 32. 92.
Hetl. 174.
Yelv. 21.
1 Sid. 52.
2 Salk. 513.
1 Vent. 337.
2 Mod. 55.
Cro. Car. 117.
Comy. 43.
1 Hale, 115.
1 Hawk. P. C. 57.
2 Hawk. P. C. 323.
Foſter, 198. 200.

* [412]

(*a*) James's caſe, 4 Co. 17.
(*b*) Johnſton v. Aylmer, Cro. Jac. 126. Harvey v. Duckin, Hob. 45.
(*c*) 5 Co. 121. a.
(*d*) Wingate.
(*e*) Expired.

meant,

meant, then they cannot be a ſubject to which the latter words may refer: "*et ſi ipſi*" muſt refer to the next antecedent, *viz* "*reges*;" there is nothing in the ſentence that mentions HIM or his people, and there is no mention of any perſon elſe but the king, *et ipſi*, I. E. *ipſi reges*, and if he had meant himſelf he would have ſaid, "if we "ſtand to our principles."—"Enemies" is a word of very general ſignification, and may extend to abundance of things; and to help this out by an *innuendo* would be ſtrange: a man is to be puniſhed for his own words, and the ſkill of the clerk is not to alter their meaning: it muſt be ſenſible words that affect an auditory. *Rolle's Abr.* 84. *tit.* "*Caſe for Words*," there are a great number of caſes to prove that an *innuendo* is not an averment, and will not ſupply words that are uncertain. Uncertainty may be ſalved two ways, as by a *colloquium* precedent, which muſt be proved, but I never knew that any body went about to prove an *innuendo*; or elſe an averment will do, as in ſaying "thy landlord," it is averrable that the plaintiff was his landlord at the time: but now here in this caſe is no ſuch averment.

MR. ATTORNEY GENERAL. It is direct and poſitive that "they flock to the king to be cured of the evil, and that he cannot "do it," that is particularly laid to be ſpoken of the king without an *innuendo*: then the *innuendo*, meaning the ſaid king, may well refer the latter words to the former: to ſay they were ſpoken of the king will not do, unleſs it were laid that they were ſpoken to excite a rebellion. There * is a great diſparity between actions on the caſe and indictments, *Fleetwood v. Curley* (*f*). "There is but one king "and one government;" it is found that he ſpoke theſe words on purpoſe to deſtroy the king and diſturb his government. If a man ſhould, in a public aſſembly, declare that the king is "a wicked "prince, and deſigns to bring in popery," this is treaſon without the laſt words: the precedents are all ſo (*g*). Indictment againſt my *Lord Grey*, for ſaying, "the king's grace ſhould be driven out of "the realm, and the prince would never ſucceed in it." In *Lord Cobham's caſe* (*h*) it is, "it will never be good days till the king, "&c." and the *caſe of Williams* (*i*), for printing "BALAAM'S ASS," a treaſonable book. In colonel *Sidney's caſe* here lately (*k*), and *Pitt's caſe* (*l*), for ſaying, "if the king ſhould ſuffer the papiſts, if "the king's throat were not cut within a twelvemonth he would be "hanged:" in none of theſe caſes were there any averments; nor could we lay it better; for if we had alledged it ſo we muſt have proved it, and we could prove only the words.

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THE LORD CHIEF JUSTICE. As for the precedents, in every one of them THE KING is named, and in that of *Williams's caſe*, the book was dedicated to the king, and I will tell you, that if you had laid it that he ſpoke thoſe words of the king, and you had proved only the words, I would have left it to the jury, whether they believed that he ſpoke the words of the king.

(*f*) Hob. 267.
(*g*) Year Book, 33 Hen. 8. Roll 17.
(*h*) 12 Jac. 1.
(*i*) The 14 & 17 Jac. 1. Roll 40.
(*k*) Skin. 145. 3. St. Tr. 710.
(*l*) At Salop, 31 Car. 2.

THE KING v. ROSSEWELL.

And THE COURT inclined *for the priſoner*, but took time to conſider of it;

But he was afterwards pardoned, and in Hilary Term his pardon was allowed.

Tamen quære of the law, for the ſtrength of the priſoner's defence on his trial, as to the fact charged, was thought the beſt of his caſe. (*g*)

(*g*) In S. C. 3 Mod. 55. it is ſaid that the judgment was arreſted.

Caſe 376. Cudmore *againſt* Lome.

Hilary Term, 35 & 36 *Car.* 2. *Roll.* 1073.

A declaration in *aſſumpſit* in an inferior court, ſtating that the defendant was indebted within the juriſdiction, is bad, unleſs it alſo ſtate that the work was done, the money lent, or the goods ſold and delivered, within the juriſdiction.

S. C. 5 Mod. 78. S. C. Comb. 347. S. C. Holt 554. Lutw. 292. to 297.

Ante, caſe 246. & poſt, caſe 430.

* [414]

WRIT OF ERROR to reverſe a judgment given in *Exeter court*, after a verdict, upon *non aſſumpſit* pleaded;

THE EXCEPTION I took was, that the defendant was ſaid to be indebted at *Exeter*, within the juriſdiction of the court, for divers wares and merchandizes * ſold and delivered by the plaintiff to the defendant, and a *quantum meruit* for work done, and an *inſimul computaſſet*, &c. and does not ſay the work was done, or the goods ſold and delivered at *Exeter*;

AND HELD naught, though it were laid *indebitatus apud Exeter*; and this has been allowed for error in abundance of caſes. *See* 1 *Lev.* 50, 69, 96, 104, 153, 156, 208, &c.

But WYTHENS *Juſtice* ſaid, that were it to be adjudged *de novo*, he would intend it ſold there;

However, there being ſuch a multitude of precedents, the judgment was reverſed upon my motion, and methinks there is a great deal of reaſon for it, for a man is indebted wherever he comes; but yet in inferior courts to intitle them to a juriſdiction, the debt ought to ariſe within the ſame, and ſo it ought to appear. (*a*)

(*a*) See the caſe of Traver v. Wall, that a declaration in an inferior court muſt ſtate not only that the defendant *promiſed to pay*, but that the money was *had and received* within the juriſdiction of the court. 1 Term. Rep. 151. See alſo the caſe of Rowland v. Veale, Cowper, 20.

Caſe 377. Cotton *againſt* Hawkins.

A judgment given in an inferior court, without ſaying '*per cur.*' or uſing any words to ſuch effect, is erroneous.

WRIT OF ERROR to reverſe a judgment given in the court of *Burton* upon *Trent* in *Staffordſhire*, in an action of the caſe for words, brought by *Hawkins*, ſpoken of him in reſpect to his profeſſion as an ATTORNEY.

I BEING OF COUNSEL *with the plaintiff in the writ of error*, aſſigned this error, *viz.* That it was not ſaid in the judgment "*per Cur.*"

Cur," nor were there any words uſed to ſupply it, neither "*per ſeneſchallum*," nor ſo much as "*ad eandem curiam*;" ſo that for ought appears it might be an award for recovery by the jury. Inferior courts ought to keep to the ſtrict form of judgments; therefore "*conceſſum*" inſtead of "*conſideratum*" is error in a judgment in any borough, or other inferior court, as in the caſe of *Horne v. Warden* (*a*), in *Fuller v. Righton*, (*b*) in *Robin v. Sambeth*, (*c*) and in *Slocomb's caſe* (*d*); and ſeveral other caſes are there of judgments in ſuch courts reverſed here, for not obſerving the due form of entry, as "*recuperaret*" inſtead of "*recuperet.*" (*e*) It * is true, in ſuperior courts "*conceſſum*," or "*adjudicatum eſt*" may ſuffice, becauſe the practice and courſe of the courts at Weſtminſter is the law of theſe courts; and in *Coke's Reports* in the pleadings, there you may find ſeveral judgments with "*ideo conceſſum eſt*" by the courts here above: nay, this very omiſſion of "*per curiam*" is no error in a ſuperior court, as the Common Pleas, where they never ſay any more than "*ideo conſideratum eſt*," and it ſhall be intended to be by the court. But otherwiſe in caſe of inferior juriſdictions, as in the caſe of *Smith v. Smith*, (*f*) it was held expreſsly to be error in an inferior court, and in *Siderfin* (*g*) there is this "NOTE, when it is in an inferior court it ought to be *conſideratum eſt* "*per curiam*, otherwiſe it is erroneous." See *Meade v. Axe*, (*h*) writ of error brought on a judgment in caſe for words as this is, and reverſed for this error, becauſe the judgment was "*conſideratum eſt*," and the words *per Cur'* omitted, *March's Rep.* 15. *caſe* 37. Again in the ſame book (*i*) is an *anonymous caſe* of a writ of error to reverſe a judgment in debt upon an arbitrement, and the error aſſigned was in the entry of the judgment, it being *conſideratum eſt* and *per Cur'* left out. In this Court it has been allowed error in the awarding of a *venire facias* to omit "*per Curiam*;" it was ſo ruled in the LORD RAINSFORD's time; much more is it neceſſary in the judgment, which is properly *actus curiæ*. In the caſe of *Stubs v. Manley.* (*k*) Debt on an obligation in the court at *Otſebridge* in the county of *York*, writ of error brought here, and the common error aſſigned; and ROLLE *Chief Juſtice*, upon oyer of the record, took this exception, that it was *ideo præceptum eſt vicecom.* and doth not ſay "*per Cur.*" and the judgment was reverſed. And in *Rolle's Abr.* 772. are ſeveral of this nature.

* [415]

And upon this exception we had a rule for judgment of reverſal, unleſs better cauſe was ſhewn before the end of the term.

* But afterwards the laſt day of the term they came and moved to quaſh our *writ of error*, for that the record was not removed; A writ of error directed "to the ſteward and bailiff" of an inferior court and recited to be *coram nobis*, will not remain A RECORD ſtating the court to have been held "*coram W'. S. ſeneſchallo.*" Vide cont. Hay v. Adams. 2 Saund. 291, 292.

(*a*) Hilary Term, 21 Jac. 1. B. R. Latch. 83
(*b*) 1 Bulſt. 125.
(*c*) 3 Bulſt. 92.
(*d*) Trinity Term, 11 Car. 1. B. R. Cro. Car. 319.
(*e*) Stroud v. Blundel, 1 Roll. Abr. 711.
(*f*) In the King's Bench, Trinity Term, 15 Car. 2. 1 Sid. 141.
(*g*) 1 Sid. 143.
(*h*) Eaſter Term, 5 Car. 1.
(*i*) March, page 7. caſe 16.
(*k*) In the King's Bench, Mich. Term. 1649. Stiles 165.

* [416]

COTTON v. HAWKINS.

the record being, and the court held "*coram W. S. ſeneſchalla*," and our writ of error was directed to the ſteward and bailiff, and recited *coram nobis*, ſo that it is not the ſame judgment. If the courts had been before them both, though one returned it, yet it would be well enough, but being before one only it is naught. And the writ of error was quaſhed.

Caſe 378. Howſon *againſt* Denham.

On a covenant upon aſſignments of debts, not to do any act or thing whereby the plaintiff ſhould be hindered from receiving the ſaid debts, *quære* whether a breach "that he releaſed one J "S. ſo much "money due "and owing to, "&c." be well aſſigned without ſhewing how the releaſe was made.

WRIT OF ERROR brought, in the Exchequer-Chamber, upon a judgment given in action of covenant by *nihil dicit* in the King's Bench, and the general error aſſigned.

The error they aſſigned *ore tenus*, when they came to argue it, was in the ſetting forth of the breach, which was on a covenant, upon aſſignment of debts, not to do any act or thing whereby the plaintiff ſhould be hindered from his receiving the ſaid debts; and the breach was aſſigned thus, "*quod relaxavit cuidam J. S. ſummam, &c.*" and does not ſay how; ſo that it cannot by any means appear to the court whether ſuch releaſe were ſufficient to diſcharge the debt; for he ought to have ſet forth the deed if it were by deed, &c.

And MR. BONYTHON cited the caſe of *Chantflower v. Preſtly* (*a*) where breach was aſſigned in covenant, that he was diſturbed in the enjoyment of a copperaſs, and the error aſſigned was, that he did not ſhew by whom he was diſturbed, or that he was *legitimo modo* diſturbed; for though he need not ſet forth the particular ſpecial title by which he was diſturbed, yet he ought to ſhew ſuch a diſturbance as may appear to have been unlawful. If a diſcharge be pleaded, he ought to ſhew how it is, for if it be not ſufficient it is no diſcharge, and the ſufficiency is matter in law, and therefore muſt be ſeen and judged by the Court, and ſo is 22 *Edw.* 4. *fol.* 40. cited in *Hob.* 269.

* [417] I BEING OF COUNSEL *with the defendant* in the writ of error, argued that it was well enough; that "*relaxavit*" was * ſufficient; that it ought to be intended an effectual releaſe, and we have laid *per quod* we could not recover the ſaid debt. Beſides, it being a tranſaction between third perſons, we are no party thereto; the releaſe is in a debtor's hands, and we have no means to come by it, and to ſay it was by deed would be unadviſable in us, for perhaps it was a parole releaſe, which will be good to diſcharge a debt by ſimple contract; and for any thing that appears here, it was ſuch a debt, and "releaſe" is the ſtrongeſt word we could uſe. And for the authorities cited, they are anſwered by themſelves; in that of *Chantflower v. Preſtly* the covenant was for enjoyment without *lawful diſturbance*, and the exception there allowed was, that he had not ſaid that he was lawfully diſturbed; and for that in *Hobart* it was a caſe of tithes, which, are payable *de jure*, and of common right, and he that will plead a diſcharge from them, ought to ſet forth how; but ours is a different

(*a*) Yelv. 30.

Howson v. Denham.

caſe; but we have ſaid "*relaxavit*," which is more than the word "*exoneravit*," and yet that has been allowed ſufficient; and ſo it was in the caſe of *Prideux v. Rawlins* (*b*) and held not erroneous, though it did not ſet forth how, and the judgment was affirmed being upon a writ of error out of an inferior court. Then I cited the caſe of *Langden v. Stokes* (*c*) *aſſumpſit* on a valuable conſideration, to go ſuch a voyage in ſuch a ſhip before *Auguſt* following, and alledges a breach in not going the voyage; the defendant pleaded, that before any breach the plaintiff at the, &c. the fourth of April "*exoneravit* "*eum*" of the ſaid promiſe; to which the plaintiff demurred; and ROLLE argued, that this pleading a diſcharge, without ſhewing how, was not good, and cited the book MR. BONYTHON mentioned of 22 *Edw.* 4. 40. that "*indemnem conſervavit*" or "*exoneravit*" is no plea; but MAYNARD for the defendant argued to the contrary, that foraſmuch as this was an action grounded upon a promiſe by words, it may be diſcharged by words before the breach thereof; and therefore "*exoneravit*" generally is a good plea; and he cited 3 *Hen.* 6. 36. And of this opinion was ALL THE COURT; and * RICHARDSON *Chief Juſtice* ſaid he knew it had been ſo reſolved divers times; and the rule was remembered "*eodem modo* "*quo oritur, eodem modo diſſolvitur*;" wherefore it was adjudged for the defendant *quod querens nil capiat per billam.* Alſo that very caſe is agreed for law in the caſe of *Edwards v. Weeks* (*d*) where the difference is made between a diſcharge or releaſe before breach and after; but in both of theſe caſes it is agreed, that the plea of "*exone-* "*ravit*" generally is a good plea, becauſe it might be releaſed by parol, and ſo may a debt upon a ſingle contract, as our caſe is.

* [418]

But LEVINZ *Juſtice* doubted, ſaying, that true it is, we need not produce the deed of releaſe in pleading, where it is to a third perſon, and we claim not under him, nor have any means to come by it; but we muſt ſay whether it was by deed or no, or how, and that we have the ſame means to come to the knowledge thereof, as of the matter itſelf, *viz.* that ſuch a debt was releaſed. Beſides, here (ſaid he) you do not ſo much as ſay that the debt was diſcharged by it, for there might be a releaſe given which might be of none effect.

I ANSWERED, That we had ſaid that he did releaſe to one *J. S.* ſo much money owing and due to, &c. which is as much as ſaying that he did abſolutely acquit and diſcharge him; and ours is much ſtronger than if we had ſaid "*fecit quandam relaxationem.*"

But however THE COURT adjourned the matter to another term.

(*b*) In the King's Bench, in Hilary Term, 31 & 32 Car. 2.
(*c*) Cro. Car. 383.
(*d*) 1 Mod. 262.

King *againſt* Clarke. Caſe 379.

No reſtitution on removing indictment of forcible entry.

INDICTMENT for a forcible entry upon *Felton*, a tenant for term of years under *Mr. Gower*, removed by *certiorari* hither.

KING v. CLARKE.

I being of counſel with *Mr. Gower*, moved for reſtitution according to the ſtatute;

In forcible entry the perſon ſtill continues tenant notwithſtanding the expulſion.

Mr. Pollexfen therefore moved for *Clarke*, that the indictment was naught, and ſo being erroneous, we ought not to have reſtitution; and the exception he took was, that it was ſaid *adtunc et adhuc tenentis*, which could not be after expulſion.

* [419]

* But afterwards, we moving it again at another day when the Lord *Chief Juſtice* was abſent, WYTHENS *Juſtice* was of opinion that was no exception; for notwithſtanding the forcing away and expulſion, *Felton* continued tenant to *Gower*.

And yet they pretending a title, and we offering to accept a declaration, and try the title in ejectment, IT WAS ORDERED, that if they were nonſuit, or a verdict paſs againſt them, or if they did not try the cauſe within the term, we ſhould have reſtitution; and accordingly they not trying the cauſe, we had a reſtitution and recovered our poſſeſſion.

However as to THE EXCEPTION, ſee *Rex v. Skei and others*, in 2 *Bulſt.* 121. where it was *diſſeiſivit J. S. de, &c. adtunc et adhuc libero tenemento ſuo exiſtente*, which if it were *adhuc liberum tenement. ſuum*, there could be no *diſſeiſin*, and by conſequence a repugnancy; and therefore the indictment held naught: but in our caſe it is an indictment, not for the *diſſeiſin* of a freeholder, but for the expulſion of a tenant for years by the ſtatute of *King James*, and he may be expelled or evicted by a ſtranger, and yet continue tenant to his landlord. *Ideo quære.*

No reſtitution in forcible entry, if the indictment be bad.

NOTA INDE, That if ſuch an indictment be naught, no reſtitution ought to be, though the force be found; nay, the indictment, if faulty, ſhall be quaſhed upon motion after reſtitution granted; and in ſuch caſe a reſtitution ſhall be awarded.

* Hilary Term,

The Thirty-ſixth and Thirty-ſeventh of Charles the Second,

IN

THE KING's BENCH.

Sir GEORGE JEFFERIES, *Knt. Chief Juſtice.*

Sir FRANCIS WYTHENS, *Knt.*
Sir RICHARD HOLLOWAY, *Knt.*
Sir THOMAS WALCOT, *Knt.*
} *Juſtices.*

Sir ROBERT SAWYER, *Knt. Attorney General.*
Sir HEANAGE FINCH, *Knt. Solicitor General.*

The King *againſt* Oates.

Caſe 380.

THE DEFENDANT being indicted for *perjury* at THE OLD BAILEY, there pleaded to iſſue; and the indictment was removed by *certiorari*, and he forced to plead again *de novo*, becauſe, as they ſay, their proceedings below are diſcontinued by the bringing of a *certiorari*; for that there can be no *continuance* made from an inferior to a ſuperior court.

Qu. If an indictment for perjury be removed from THE OLD BAILEY by *certiorari*, after iſſue joined, whether the defendant muſt plead *de novo*.

But it ſeems needleſs, and done only *pro majori cautela*; for the whole is removed, the iſſue as well as the indictment.

S. C. 4 St. Tr. 1.

He was afterwards tried at THE BAR, and convicted of perjury on two ſeveral indictments.

Titus Oates convicted of perjury.

Powle

Caſe 381.

Powle *againſt* Trumball.

A ſuit lies in the ſpiritual court for *dilapidations* ſuffered before a *general pardon*; for the *civil injury* is not thereby pardoned.

PROHIBITION prayed to a ſuit for dilapidations ſuffered before the *act of oblivion*: and IT WAS HELD that they cannot proceed criminally there, for the puniſhment is pardoned; and if they do, a prohibition ſhall go; but they may proceed there to make ſatisfaction to the party, for that is not pardoned. And a prohibition was denied.

S. C. 3 Mod. 56. 5 Co. 51. Cro. Car. 357. 1 Salk. 383. 1 Peer Wms. 696. 1 Stra. 473. 529. 1 Ld. Ray. 215.

Caſe 382.

*[421]

* Ambroſe *againſt* Rowe.

Michaelmas Term, 36 *Car.* 2. *Roll.* 504.

If *one man* retain AN ATTORNEY for *another*, and promiſe to pay him, *indebitatus aſſumpſit* lies againſt the perſon retaining on this *expreſs promiſe*. S. C. Skin. 217. Moor 701. Cro. Jac. 520. 2 Ld. Ray. 842. 902. Eſpin. Dig. 173. 1 Term. Rep. 62.

INDEBITATUS for proſecuting ſuits as an attorney for *B.* at the requeſt of the defendant;

Upon motion in arreſt of judgment it was held good: and the caſe of *Sands v. Trevilian* (*a*) denied to be law; for that though ſoliciting in another's cauſe will not raiſe *a contract* from *J. S.* yet an *expreſs promiſe* from *J. S.* to pay for the ſolicitations of *J. N.*'s cauſe, will make it *a debt*: as if I build a houſe for *J. S.* at the requeſt of *J. N.* and *J. N.* promiſes to pay me, *debt* will lie; ſo in caſe of a ſurgeon's cure; and there is no difference between thoſe caſes and this: it is true, it will not raiſe a promiſe, but an expreſs promiſe will well ground an action.

And JEFFERIES *Chief Juſtice*, ſaid, that he thought *Rolle's* argument in that caſe of *Sands v. Trevilian* not to be anſwered. (*b*)

(*a*) Cro. Car.. 107. 193. (*b*) See 3 Jac. 1. c. 7. and 2 Geo. 2. c. 23

Caſe 383.

* Dorrington *againſt* Edwin and others.

Michaelmas Term, 36 *Car* 2. *Roll* 277.

If a replevin by plaint, on which *pledges* are found in the ſheriff's court, be removed by *certiorari* into the King's Bench, and the plaintiff obtain judgment, a *ſcire facias* lies againſt the *pledges*, on the return of an *elongatus* to the *return habendo*. Com. Rep. 590.

REPLEVIN in the ſheriff's court in London by plaint, and pledges there found, and on *breve de proſequendo* and *return. habendo*, the record is removed by *certiorari*, and a *ſcire facias* ſued here againſt the pledges.

MR POLLEXFEN argued, That the record is no more removed than an *habeas corpus*, which is to remove the body *cum cauſa* (*a*), and the bail below are not chargeable here in ſuch caſe, and therefore the pledges in replevin are in the ſame caſe; and that the ſtatute of *Weſtminſter the ſecond* does not extend to replevin by plaint.

——S. C. Poſt, 485. S. C. 3 Mod. 56. S. C. Comb. 1. S. C. Skin. 244.

(*a*) 2 Inſt. 340.

MR.

MR. HOLT *e contra* argued, That where the record is removed pledges are thereupon *ad proſequend. et return. habend.* and therefore we may have a *ſcire facias* here now ſince the plaint and all is removed. (*b*) It is true, when it comes hither by a *recordare*, the plaint is not removed, but the command of the writ * is to make a record and return it: the reaſon of the book of 29 *Edw.* 3. *pl.* 28. is, becauſe the pledges appear not upon record but only by ſurmiſe, and thereupon ſhall not have execution upon it againſt the pledges; but here the pledges and plaint are all apparent. DORRINGTON v. EDWIN. * [422]

POLLEXFEN. The plaint and pledges are removed there. (*c*)

MR. HOLT. Pledges at common law are good here after removal, and the record here is removed by the plaintiff in the replevin. (*d*)

Adjournatur. (*e*)

Quære, If bail in an inferior court, as *the Marſhalſea*, &c. be not liable after judgment affirmed here upon a writ of error? Bail. 1 Bac. Abr. 211.

(*b*) Year book, 39 Edw. 3. pl. 28.
(*c*) Raſtal's Ent. 570. Cro. Eliz. 436. 594.
(*d*) Year Book, 3 Hen. 6. pl. 3. a.
(*e*) This caſe was moved again in Michaelmas term, 2 Jac. 2. and JUDGMENT given for the plaintiff, that the *ſcire facias* well lies. S. C. Poſt, 485. againſt the pledges. S. C. 3 Mod. 58; for as the party is in court by the removal of the record, ſo are the pledges. S. C. Comb. 2. The ſame point was determined in the caſe of Mulſo v. Shere. Fort. 330. And it ſeems there is no difference whether the replevin is by *plaint* or by *writ*, for the ſheriff before he grants the one or executes the other is bound to take pledges *de proſ.* and *de retorno habendo*. Gilb. Replev. 2 edit. 67. See alſo 1 Jones 439 Cro. Car. 594. Comy. Rep. 593. and 11 Geo. 1. c.

De la Courtier *againſt* Bellamy. Caſe 384.

Michaelmas Term, 36 *Car.* 2. *Roll.* 664.

ACTION on the caſe on a bill of exchange from parts beyond the ſeas, payable at *double uſance* from the date thereof: cuſtom alledged accordingly; and the fact was alledged to be, that the party beyond the ſea drew ſuch a bill ſuch a day, and the ſame was afterwards preſented to, and accepted by the defendant. In an action on a foreign bill of exchange, if the *date* be omitted, the court will intend it dated at the time it is ſtated to have been drawn. Poſt, caſe 400. 404. 426. 462. 473.

And exception was taken, that *the date* of the bill was not ſet forth:

And PER TOTAM CURIAM held, it was well enough, and they would intend it dated at the time of drawing it.

Judgment for the plaintiff.

Alleway *againſt* Rowden. Caſe 385.

Michaelmas Term, 36 *Car.* 2. *Roll.* 509. *or* 519.

ERROR on a judgment in *Ireland* in ejectment there, the declaration was upon a demiſe from the *Lady Conway*, and a verdict and judgment there for the plaintiff. A *demurrer* will lie to a *challenge of the array*, or an *iſſue* may be taken on the fact alledged.

The

ALLEWAY
v.
ROWDEN.
* [423]

The error aſſigned by MR. POLLEXFEN was, that on the trial there was *a demurrer* to the *challenge* to the array; whereas there ought to have been *iſſue* joined * and tried.

Before the 24 Geo. 2. c. 18. it was a good cauſe of challenge of the array, where *a peer* was a party, that *two knights* were now returned on the panel.

The defendant there challenged the array, for that the *Lady Conway* being a counteſs there, was the leſſor of the plaintiff; and that ejectment was brought to try her title, and ſhe did bear the coſts of the ſuit, and proſecuted the ſame; and that the ſheriff had made that array, *nullo milite in eodem exiſtent. retornato:* and this, he ſaid, was a good challenge, and for that cited the caſe of *Eyre v. Baniſter* (*a*) where *conſanguinity* in the leſſor of the plaintiff was allowed a good challenge in ejectment.

And after much debate by MR. POLLEXFEN and MR. HOLT for the plaintiff in the writ of error; and MR. ATTORNEY, MR. SOLICITOR, and PEMBERTON *Sergeant for the defendant*,

THE COURT reſolved;

Defendant may *challenge* as well as plaintiff.

FIRST, That a defendant might take advantage of *two knights* not being returned as well as the plaintiff, notwithſtanding the opinion in *Dyer*. (*b*)

A *challenge* to the array may be taken in *ejectment*.

SECONDLY, That it might be in *ejectment* as well as any other action; for now a days we take notice of the plaintiff's leſſor, as ſolely, virtually, and really plaintiff, and the other is but nominal: and it appears upon record to be the *Lady Conway's* demiſe.

If two jurors be returned as *knights* and the array challenged becauſe no *knights* are returned, a demurrer and joinder thereon precludes an enquiry into the fact.

But THIRDLY, They held that the *demurrer* was well enough, for they generally ſaying *nullo milite retornato* was not good, for the *venire* was *tam milites quam alios*, and the ſheriff had returned two men *knights*, and if they were not ſuch you ought to have ſaid that the two men were not really knights, and ſo you might have tried it; but now here are two returned, and that is well enough.

Demiſe in ejectment after Bill filed.

FOURTHLY, Another exception was taken, that the leaſe was made after the bill filed, which was of *Michaelmas Term* generally, that is the firſt day, and the demiſe was the thirtieth day of October.

But it was anſwered by PEMBERTON *Sergeant*, That that is a miſtake, for the term begins not till the ſixth of November.

And the judgment was affirmed.

(*a*) Moor 895. (*b*) See now the 24 Geo. 2. c. 18. 2 Hawk. P. C. c. 43 ſ. 4.

Caſe 386.
* [424]

* Cole *againſt* Daniel and others.

Michaelmas Term, 36 *Car.* 2. *Roll.* 127.

A declaration on an eſcape from the COMPTER is good although no *continuances* are ſtated.——Ante, caſe 10, 299, 300. 2 Lev. 158. 1 Vent 314. Lutw. 26. 182. 402.

ACTION againſt the ſheriffs for ſuffering one to eſcape that was in THE COMPTER, upon a plaint there levied, and ſays, " That whereas ſuch a one was indebted to him, &c. he being in

" their

" their cuſtody by virtue of the ſaid plaint, they ſuffered him to " eſcape."

COLE v. DANIEL.

MR. POLLEXFEN took exceptions, That there were no *continuances* entered; no proceedings from the entry of the plaint to the time of the eſcape.

ET PER CURIAM, As to the firſt exception, in *London* we never uſe it as it is done in other inferior courts.

ANOTHER EXCEPTION was, that they had not ſaid that the cauſe of action aroſe within the juriſdiction.

A declaration on an eſcape from THE COMPTER is good, although it is not ſtated that the caſe aroſe within the juriſdiction.

And as to the ſecond, upon evidence, it is true, we make them prove it within the juriſdiction, but it is well enough if it do not appear to the contrary.

Judgment for the plaintiff.

1 Lev. 50. 69. 96. 105. 137. 156. 1 Sid. 85. 6 Mod. 224.

Brown *againſt* Evans. Caſe 387.

Hilary Term, 35 & 36 *Car.* 2. *Roll* 123.

ERROR on a judgment in a *quod ei deforceat* at the GRAND SESSIONS in *Wales*.

Judgment in a *quod ei deforceat* erroneous for want of *grand cape*.

The error was aſſigned, in that there was neither *appearance* nor *grand cape*.

AND HELD error, and the judgment reverſed, though there were three ſummons.

Then AN EXCEPTION was moved to the *writ of error*, for that it was directed to the juſtices, and the judgment was before two of them, (VIZ. *Manley* and *Bugbie*) and one of them only returned it, but the record was right before both, though certified but by one;

It is no exception to a writ of error that it was returned by only *one* of the perſons to whom it was directed. Ante, 414.

And ALL THE COURT thought it well enough.

And the judgment was reverſed.

Memorandum.

*UPON *Friday* the ſixth day of *February*, about ten in the morning, KING CHARLES the SECOND died at *Whitehall*, the courts ſitting, upon news whereof they all roſe:

The death of king *Charles the Second*.

The next morning all the judges had their patents renewed, and they were all ſworn at my lord keeper's; and on *Saturday* they ſate and heard a few motions, the king's counſel coming without the bar till they had their patents renewed. (*a*)

The judges patents renewed on the death of the king.

Dyer, 165. 1 And. 44. 2 Hawk. P. C. ch. 1. ſ. 11.

And * [425]

(*a*) But now by 7 and 8 Will. 3. c. 17. ſ. 21. and 4 Ann. c. 8. no commiſſion, patent, or grant either civil or military ſhall determine by the demiſe of the crown, but ſhall

Diſcontinuance on the demiſe of the crown.

And upon the demiſe of the king all proceedings in *crown cauſes* were diſcontinued, and nothing remained but the indictment or information; and accordingly ſeveral now pleaded *de novo*; (*b*) BUT RESOLVED, where judgment is ſigned, and entered, *quod capiatur*, &c. though no fine ſet or ſentence given, yet it ſtands. *See* 7 *Rep.* 29, 30. 1 *Cro. Farrington's caſe.*

ſhall continue in force for ſix months after ſuch demiſe, unleſs ſooner determined by the next immediate ſucceſſion to the crown. And by 1 Geo. 3. c. 23. the commiſſion of judges ſhall continue and remain in full force during their good behaviour, notwithſtanding the king's demiſe.

(*b*) By 1 Ann. c. 8. ſ. 5. no original writ, writ of *niſi prius*, proceſs, or proceedings whatſoever, in or iſſuing out of any court of equity, nor any proceſs or proceedings upon any office or inquiſition, nor any *certiorari* or *habeas corpus*, nor any writ of attachment or proceſs for contempt, ſhall be determined by the demiſe of the crown. Stra. 782. 843.

Eaſter

Eaſter Term,

The Firſt of James the Second.

KING'S BENCH.		COMMON PLEAS.	
Sir GEO. JEFFERIES, *Knt.*	*Chief Juſtice.*	*Sir* THOMAS JERVIS, *Knt.*	*Chief Juſtice.*
Sir FRANCIS WYTHEN, *Knt.*	} *Juſtices.*	*Sir* JOB CHARLTON, *Knt.*	} *Juſtices.*
Sir RICH. HOLLOWAY, *Knt.*		*Sir* THOMAS STREET *Knt.*	
Sir THOMAS WALCOT, *Knt.*		*Sir* H. BEDDINGFIELD, *Knt.*	

EXCHEQUER.

WILLIAM MONTAGUE, *Eſq.* *Chief Baron.*
Sir EDWARD NEVIL, *Knt.*
Sir EDWARD ATKINS, *Knt.* } *Barons.*
CHRISTOPHER MILTON, *Eſq.*

Sir ROBERT SAWYER, *Knt.* *Attorney General.*
HEANAGE FINCH, *Eſq.* *Solicitor General.*

Croſſe *againſt* Young.

Caſe 388.

Hilary Term, 35 & 36 *Car.* 2. *Roll.* 150.

DEBT upon a bond for ſixty pounds. The defendant craves *oyer* of the condition, which is for performance of covenants in a certain indenture; and for plea ſays, that the indenture was, &c. (and ſo ſets forth the whole) and the covenant on the defendant's (the leſſor's) part, *viz.* "* That the plaintiff, his heirs and "aſſigns for ever, ſhould and might have, hold, uſe, occupy, poſſeſs "and enjoy the ſaid premiſſes, without the lawful let, impediment, "hindrance, interruption or diſturbance of him the ſaid defendant, "his heirs or aſſigns, or any other perſon or perſons lawfully claim-

On a covenant "for quiet enjoyment free from "all lawful interruption," a breach aſſigned that the defendant, "claiming "title and lawful right under A. B. entered, &c." is

ſufficient; for it is not a breach from the act of *a ſtranger*, but of the *convenantor* himſelf. 1 Mod. 66. 101. 290. 2 Mod. 213. 3 Mod. 135. 4 Mod. 78. 3 Bac. Abr. 715. 3 Bl. Com. 394. Comy. Rep. 146. 2 Stra. 1011. Dougl. 43. H. Bl. Rep. 275. 1 Term. Rep. 672. 3 Term. Rep. 584.

CROSSE v. YOUNG.

" ing, or to claim, by, from, or under him, them, or either of them, " &c." and pleads *performance generally.*

The plaintiff replies, *proteſting* that the defendant has not obſerved and performed, &c. *et pro placito dicit, quod poſt confection. indentur. præd. et ante exhibitionem billæ præd. viz.* On the firſt day of March in the thirty-ſixth year of *Charles the firſt*, the ſaid defendant claiming *legale jus et titulum ad et in trigint. virgatas terræ* ANGLICE land-yards, *parcell. præd. clauſi, &c. ſub quodam* RICHARDO BRODRIPPE *abſque aliquo jure titulo vel authoritate adinde ab eodem quer. in eaſdem trigint. virgatas terræ in et ſuper poſſeſſion. ipſius quer. inde intravit, ac ipſum quer' a poſſeſſione et occupatione inde adtunc ejecit et amovit ac ipſum querentem ſic inde expuliſ. et amot. a poſſeſſione ſua inde extrateuuit et adhuc extratenet contra form. et effect. indentur. præd. per quod idem querens præd. trigint. virgatas, &c. habere tenere et gaudere non potuit, nec adhuc poteſt ſecund. formam et effect. indentur. præd. et hoc paratus eſt verificare, &c. unde, &c.*

The defendant rejoins, that he did not enter on any part of the premiſſes, &c. *et de hoc ponit ſe ſuper patriam.* Iſſue was joined thereupon, and tried at the laſt aſſizes; and verdict for the plaintiff.

MR. KEENE moved in arreſt of judgment, that the breach is not well aſſigned, for that the plaintiff has not ſet forth *a title* in the defendant, and by conſequence his entry was tortious, and he a treſpaſſor, and ſo no covenant will lie, the covenant being " for quiet " enjoyment, free from all lawful interruptions;" and the breach aſſigned is only " *clamans titulum et jus legale ſub* JOHANNE, &c." and cited a caſe in *Roll. Abr. tit. Condition*, to that purpoſe.

I MOVED afterwards for judgment, for that this was the entry and eviction of the covenantor himſelf, and not a breach aſſigned upon the act of a ſtranger, in which caſe we ought to be more preciſe and particular than in the other. Here is nothing can be pretended to make any colourable objection but the word " lawful"; for were [427] it omitted, all the books * do then agree, that a tortious entry by the leſſor himſelf will be a breach of the covenant for enjoyment, though otherwiſe in the caſe of a ſtranger, becauſe againſt him another action lies, *viz.* treſpaſs, he being the wrong doer; and in the caſe of a ſtranger the plaintiff is as privy to his title as the defendant; and therefore if he will found an action thereon it is incumbent upon him to ſet forth the title. And I urged the caſe of *Tiſdale v. Eſſex* (*a*) in which the covenant was for enjoyment, and a breach was aſſigned in the entry of a ſtranger, without ſhewing a good title; and it is reſolved expreſsly, that where the breach is aſſigned in the entry of a ſtranger, there the plaintiff ought to ſhew a title in the ſtranger; otherwiſe where the breach is alledged in the entry of the leſſor himſelf.

But here THE LORD CHIEF JUSTICE interrupted me and ſaid, that it was a difference conſtantly allowed; and that againſt the party himſelf, they would not conſider the word " lawful," nor drive the plaintiff

(*a*) Moor 861.

tiff to his action of treſpaſs, when, by the general implied covenant in law, he had engaged no way to avoid his own deed, either by a rightful, or a tortious entry. And ſo we had judgment for the plaintiff.

For whom I intended to have further urged the *caſe of Core.* (*b*) Covenant for quiet enjoyment, and afterwards the leſſor enters tortiouſly, yet held to be a good breach of covenant, for the intent was, that he ſhould enjoy it without any interruption of the leſſor himſelf, and without any rightful interruption of any other perſon; and the reaſon why, in caſe of a ſtranger's entry, the title muſt be ſhewn is becauſe there the plaintiff is as privy to the title as the defendant is; they are both alike ſtrangers thereto; and it would be hard to puniſh the innocent and paſs by the wrong-doer; but here the defendant himſelf is the very doer; and the title he entered by is only known to himſelf, we are not privy to it, and therefore not incumbent on us to ſhow it. Now that even a tortious entry of the covenantor himſelf will be a breach of covenant for quiet enjoyment, is plain from the books I have cited, and alſo * from *F. N. B.* 145. b. If the leſſor leaſe a term by deed-poll, and the leſſor ouſt the leſſee, he ſhall have a writ of covenant upon this deed, though he has no indenture of it; but if a ſtranger who has no right do ouſt the leſſee, he ſhall have no writ of covenant againſt the leſſor, becauſe he has another remedy by action againſt the immediate wrong-doer; but if a ſtranger enter by an older title, then he ſhall have covenant againſt the leſſor himſelf, becauſe he has no remedy beſides; and 20 *Hen.* 7. 12. is expreſs, that if the leſſor eject his leſſee, covenant will lie be the right how it will. There is the caſe of *Cave v. Brookeſby* (*c*) where the defendant leaſed lands to the plaintiff, and covenanted that they were free from lawful incumbrances, and that they were and ſhould continue of the value of ſo much a year to the leſſee during the term; the leſſor enters on the leſſee and ouſts him; the leſſee brings covenant; and adjudged that it lies; for when the leſſor enters they cannot continue of that value, becauſe the leſſor has the profits; but if a ſtranger without a title had entered, it would have been otherwiſe; and this is the very difference of the book. It is but of late years that it has been adjudged no breach in caſe of a ſtranger's entry, &c. for in the caſe of *Cateſby v. Mountford* (*d*) it is adjudged, that the tortious entry of a ſtranger is a breach of a covenant againſt interruptions and for quiet enjoyment; but ſince that here it has been adjudged otherwiſe in caſe of ſtrangers, but never yet came ſo far as to be ruled ſo in caſe of entry and eviction by the leſſor. That a covenant, againſt a particular perſon by expreſs name, will be a defence againſt ſuch perſon's entry, whether by right or wrong, all the books do agree; and ſo is 2 *Edw.* 4. 18. and *Foſter v. Mapes*, (*e*) now the covenant in law is againſt himſelf by expreſs name, and then the word "lawful" can no way alter the caſe, for in the caſe

* [428]

(*b*) 1 Roll. Abr. 430. S. C. Cro. Eliz. 544.
(*c*) Jones 360.
(*d*) 5 Eliz. Dyer, 328, and 3 Leon 43.
(*e*) Cro. Eliz. 212.

Crosse v. Young.

of *Huys v. Bickerſtaff* (*f*) it is reſolved, that if the word were omitted in ſuch covenant, it muſt, notwithſtanding, be ſo intended; and that when a man covenants for enjoyment * without interruption, it muſt be meant not againſt the tortious acts of ſtrangers, but only againſt their rightful entries, and if a ſtranger enter covenant will not lie, unleſs he had a right, becauſe there is another remedy againſt the immediate treſpaſſor; ſo that it is the ſame thing as if it were out of the caſe; for it is no more than the law would have implied, and ſuppoſing that word out of the caſe, then it is moſt plain that a tortious entry of the leſſor will be a breach of the covenant without the word "lawful" in it, and conſequently there is no reaſon why it ſhould not be a breach when it is ſo expreſſed, it being no more than the law would otherwiſe have implied. But beſides this, entry and eviction by the defendant himſelf here is ſurely a breach of the covenant in law, implied in the words "give and grant," which is a general covenant againſt all perſons. I confeſs that the particular covenant, as in the *caſe of Nokes* (*g*) will reſtrain and qualify ſuch general covenant, as to ſtrangers and other perſons, and their acts; but as to the leſſor himſelf it remains the ſame as it was before: by the covenant in law, he has engaged that we ſhall enjoy it againſt himſelf, and without the lawful entry or interruption of any ſtranger; but becauſe that is againſt all men, therefore comes the particular covenant, and explains it only to extend to thoſe who claim "by, from, or under him," but what concerns the act of the leſſor continues the ſame and is not qualified by the particular covenant; and in *Noke's caſe*, it is reſolved, that the plaintiff has his election to ſue either upon the covenant in law, or upon the expreſs covenant; now, upon the firſt, a wrongful entry of the leſſor himſelf would be a breach; and upon the expreſs covenant, when general without the word "lawful," a tortious entry of the leſſor would be a breach, and our covenant is no more than that. Covenants as well as deeds are to be expounded, *ut res magis valeat quam pereat intentio partium*, and moſt for the advantage of the party with whom the covenant is made, and againſt the covenantor; and the office of expreſs covenants is to aſſiſt further and ſupport * the grant, and is, as the LORD HOBART calls it (*b*), a wall or muniment about the grant, and ſhall therefore never be conſtrued to impugn or contradict it, or to leave the leſſor a greater liberty to avoid his own deed by his own wrongful acts, more than he had before: the general covenant is not reſtrained or qualified by the expreſs covenant, as to the matter, or ſubſtance, but only as to the extent of it, what perſons ſhall be bound thereby; but here an enjoyment of the land without eviction by the leſſor himſelf, is the very principal ſubſtance of the agreement; that is the very purport of the conveyance, and therefore cannot be qualified by an after covenant; for if it be, ſuch after covenant will be contrary to the words of the grant, which import a defence and warranty againſt the leſſor himſelf moſt expreſsly. And in ſome caſes it is adjudged, that an

* [429]

* [430]

(*f*) Vaugh. 120.
(*g*) 4 Co. 80.
(*b*) In the Earl of Clanrickard's caſe, Hob.

expreſs

expreſs covenant ſhall not reſtrain the covenant in law, as in the caſe of *Proctor v. Johnſon*, (*i*) where the expreſs covenant was for quiet enjoyment, notwithſtanding any act done by him, or any claiming under him; and the breach aſſigned was, that A. gave this land to the defendant and J. S. jointly, and that J. S. the other jointenant, had in his lifetime conveyed his moiety to J. N. who had entered, &c. and ruled a good breach; and that the general covenant was not reſtrained by the expreſs one, becauſe contrary to the general intendment of their agreement and undertaking, which was to convey the whole land: now, in our caſe, the original and firſt agreement is for enjoyment againſt the leſſor himſelf; for the main body of the deed is nothing but an agreement that the leſſor ſhall quit the poſſeſſion of his land, and that the leſſee ſhall enjoy it without being evicted by the leſſor; therefore is it that the deed is made. This is the prime intendment of the indenture; and to reſtrain this now by a qualified covenant as to the leſſor himſelf, is as much a contradiction of the words of the grant, as an exception of one acre out of ten acres before demiſed. But * ſuppoſing that it muſt be a lawful title that he muſt enter by to break this covenant, here it is. We have ſaid that he "*ipſe præd.* "*defendens clamans legale jus et titulum ſub quodam Johanne Goodrippe* did enter and evict us, and yet holds us out contrary to his indenture, *per quod* we could not enjoy the ſame according to the tenor thereof: we could ſay no more. His title lies in his own notice, not in ours; and now I hope it will be intended: We have ſaid that he entered, and that he entered without any title or authority derived by or from us; ſo that that objection is gone; which was the true reaſon of all the caſes wherein the title is adjudged neceſſary to be ſhewn, *viz.* becauſe for ought appeared it might be by title under the plaintiff; and this was the true reaſon of the caſe of *Hanſaker v. Kirby* (*k*), and of *Wotton v. Heele* (*l*); but here is no room for ſuch preſumption in our caſe, for we have ſaid that it was without any authority or title derived from or under us. Beſides, in all caſes of breaches of covenants by the leſſor himſelf, they are all alledged generally, and not one otherwiſe. In *Salmon v. Bradſhaw* (*m*), which was covenant of having lawful right to, &c, and breach alledged that he had not, &c. *et ſic infregit, &c.* and upon writ of error it was moved, that he ought to have ſhewn what perſon had the right and eſtate, that ſo it might appear to the Court whether the defendant had, &c. but held well enough, for that it concerned the defendant himſelf, and that it lay more properly in the notice of the leſſor, than of the plaintiff, who is a ſtranger to the defendant's title. Then there is the caſe of *Muſcot v. Ballet* (*n*), breach aſſigned that he was not ſeiſed in fee generally, and ſhews not what eſtate, or that any other was ſeiſed, and held good. And here we have ſaid all we can; all that we can be preſumed privy to; we ſay it was without any title under the plaintiff: And now it muſt be intended a lawful title, becauſe ſaid to be contrary to the indenture; and beſides, that

* [431]

(*i*) Yelv. 175. S. C. 1 Bulſt. 2.
(*k*) Cro. Jac. 315.
(*l*) 1 Sid. 466. S. C. 1 Mod. 66. 290.
(*m*) 9 Co. 60. S. C. Cro. Jac. 304.
(*n*) Cro. Jac. 369.

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* [432]

is admitted by the pleading, for they come and ſay they did not enter, and ſo waive the other matter, * and there is a verdict for us; after which to maintain the action, you will I hope intend it a rightful title, if ſuch be needful. We have alſo ſaid, that by reaſon of this eviction, we could not and cannot enjoy the premiſſes according to the deed, and the jury have found it ſo: that is the caſe of *Gill* v. *Glaſſe* (o). Debt for rent upon a leaſe, the defendant (the leaſe not being by indenture) pleads that the plaintiff *nihil habuit in tenementis, &c.*; the plaintiff replies, that he had a good and ſufficient eſtate, &c. an iſſue was taken thereupon, and a verdict for the plaintiff, and error aſſigned that the plaintiff ought to have ſhewn that he had a ſufficient eſtate, and what, to which the Court agreed, but ſaid that it was aided by the verdict, for though the replication and iſſue were ill, yet there being an iſſue tried, it ought now to end the matter, the iſſue being upon a material point, whether he entered and evicted us or no? And the verdict in our caſe finds this true, that he entered contrary to the form of the indenture, and therefore that is ſupplied by this verdict. A verdict will ſupply many an omiſſion, as in the caſe of *Reynolds* v. *Buckle* (p). Debt for rent; the defendant pleads, that before any rent was due, the plaintiff entered upon him, but did not ſay that he expelled or held him out; and ſo iſſue was taken upon *non intravit*, and found for the defendant, and he had judgment for him though his plea were inſufficient, yet the verdict had ſupplied it. Now both theſe laſt caſes are much like to ours: and for the caſes urged on the other ſide, they are breaches aſſigned upon the entries of ſtrangers, which come not near our caſe, and ſuch where the evictor might, for ought appears, derive a title from the plaintiff himſelf; and all the reaſons which govern thoſe caſes are wanting in ours, as that the plaintiff knows the title of the ejector as well as the defendant, and that the innocent would be puniſhed for the wrong of a third perſon; here it is his own act, and he himſelf is the wrong-doer, and if by wrong, or if by title, it is his own, and the plaintiff not privy to

* [433]

it; and ſo for the other reaſon, that * there would be a double remedy againſt two perſons, they all fail in our caſe.

This I had prepared to urge, but was prevented by a ready judgment for the plaintiff by THE WHOLE COURT.

(o) Yelv. 227. S. C. Cro. Jac. 312. (p) Hob. 326.

Caſe 389. Raymond and others *againſt* Barber.

Hilary Term, 36 & 37 *Car.* 2. *Roll* 339.

The ſheriffs of *London* cannot ſue as one ſheriff. 8. C. 1 Lut. 886. 8. C. N. Lut. 272.

DEBT on a bond brought by the plaintiffs as ſheriffs of *London*, wherein the plaintiffs declare as one ſheriff; and upon a bond made *eidem vicecomiti*: demurrer to the declaration.

Upon

Upon debate, it was held naught BY THE WHOLE COURT, for that in *London* they are two ſheriffs; whereas in *Middleſex* they are but one. RAYMOND v. BARBER.

And judgment was given for the defendant.

And although it was moved ſtrongly that they might amend, yet refuſed by THE COURT, it being an old bail-bond, and the principal plaintiff and defendant in the original action had been in Chancery for ſome years.

Hawes *againſt* Randal. Caſe 390.

TROVER for ſeven pieces of linen cloth. NAUGHT, becauſe not certain how many yards, and *a piece* is not a known quantity. See *contra*, *Graves v. Drake*, in *Style*, 199. and *Leving v. Gamble*. *Ibid.* 102. Trover for ſeven pieces of cloth, without ſaying how many *yards*, is bad.

* Trinity Vacation, * [434]

The Firſt of James the Second,

IN

THE KING's BENCH.

Memorandum.

IN *Trinity term Monmouth*'s rebellion in the *Weſt* prevented much buſineſs. In the vacation following by reaſon of that rebellion, there was no aſſizes held in the *weſtern circuit*; but afterwards five judges went as commiſſioners of *oyer* and *terminer*, and gaol-delivery, and three hundred and fifty-one of the rebels were executed, &c.

The aſſizes on the weſtern circuit not held during *Monmouth*'s rebellion.

Memorandum.

IN this vacation the LORD KEEPER NORTH died, and ſo did MR. JUSTICE WALCOT, and my LORD JEFFERIES had the Great Seal delivered to him by the name of Chancellor.

NORTH *Lord Keeper* dies, and the Great Seal is delivered to *Jefferies*.

And SIR EDWARD HERBERT was made Lord Chief Juſtice in his place; and SIR EDWARD LUTWYCHE Chief Juſtice of the Common Pleas in his place; and SIR ROBERT WRIGHT Judge in his place; and SIR EDWARD NEVIL Puiſne Baron in his place.

Herbert, *Lutwyche*, *Wright*, and *Nevil* promoted.

In this vacation alſo died SIR JOHN CHURCHILL, Maſter of the Rolls, and in his place ſucceeded SIR JOHN TREVOR.

Trevor ſucceeds to THE ROLLS on the death of *Churchill*.

Memorandum.

Monmouth executed.

IN this *vacation* the *Duke of Monmouth*, was executed at *Tower-hill*, by the king's warrant, being attainted of high treaſon by act of parliament.

Memorandum.

Alderman *Corniſh* convicted.

AT *Michaelmas ſeſſions* at THE OLD BAILEY, was *Alderman Corniſh* tried and convicted, and attainted of high treaſon, one of his accuſers being *Richard Goodenough*, his late under-ſheriff.

Memorandum.

Alderman *Corniſh* executed.

AND on the firſt day of *Michaelmas term*, being the twenty-third of *October*, and *Friday*, *Mr. Corniſh* was executed in *Cheapſide* between *King-ſtreet* and *Soaper-lane*.

* Michaelmas Term,

The firſt Year of James the Second,

IN

THE KING's BENCH.

Sir EDWARD HERBERT, *Knt. Chief Juſtice.*

Sir FRANCIS WYTHENS, *Knt.*
Sir RICHARD HOLLOWAY, *Knt.* } *Juſtices.*
Sir ROBERT WRIGHT, *Knt.*

Sir ROBERT SAWYER, *Knt. Attorney General.*

HEANAGE FINCH, *Eſq. Solicitor General.*

Newton *againſt* Stubbs.

Caſe 391.

A declaration in ſlander, laying the words in *Latin*, is good, although it be not averred that the auditors underſtood the Latin language.

ACTION on the caſe for words ſpoken of the plaintiff, being a juſtice of peace, that "he by virtue of the commiſſion did "worry men out of their eſtates;" that at another time he ſpoke theſe falſe and ſcandalous words, laying them in *Latin*; and that at another time afterwards "*dixit, retulit, et publicavit hæc falſa ſcanda-* "*loſa verba ad effectum ſequentem, &c.*" a general verdict and damages intirely aſſeſſed.

S. C. 3. Mod. 71. 1 Roll. Abr. 86. Hob. 126. 268.

MR. TRINDER moved in arreſt of judgment, that here are words laid to be ſpoken in *Latin*, and no averment that the auditors to whom they were ſpoken did underſtand *Latin*, as there ought to be; and cited for that the caſe of *Jones v. Dawkes* (*a*) where it was adjudged, that if a man ſpeak certain ſcandalous words of me, in the preſence of men who do not underſtand *Latin*, no action lies, becauſe it is no diſcredit to me, albeit, it was averred that the auditors underſtood *linguam Romanam*, for that may be *Italian*, which is now the *Roman language*; and the like of *Welch words*, in the caſe of *Price v. Jenkins*. (*b*)

(*a*) 1 Roll. Abr. 74. ſame caſe, under the name of Johns v. Dauery. Cro. Eliz. 496.
(*b*) Cro. Eliz. 865.

But

NEWTON v. STUBBS.

But to this it was anſwered by MR. POWEL, counſel for the plaintiff, and by THE COURT, that of late it has been adjudged good; and it is now common to lay the words in *Latin*, in informations for libels, and for ſeditious * words, and it is not ſaid "theſe "*Latin* words," but "theſe words following," which are laid in *Latin*: (*c*) beſides, thoſe who prove the words muſt underſtand *Latin*, elſe they could not prove the words; then as that caſe cited is in *Croke* (as I have peruſed it) the judgment there was arreſted for want of a ſufficient certainty that the words were ſpoken *of* the plaintiff.

* [436]

A declaration in ſlander, ſtating, that the defendant ſpoke "*theſe* falſe and "ſcandalous "words," *to the* EFFECT following, is bad for uncertainty. S. C. 3 Mod. 72. Cro. Eliz. 857. 2 Salk. 661. 2 Stra. 934. B. R. H. 305. Comp. 672.

MR. TRINDER then urged another exception, that they are laid "*ad effectum ſequentem*" which is too uncertain; for hereby it will lie in the power of a witneſs to ſwear the import or ſenſe of words, which will be of dangerous conſequence; and for this he cited the caſe of *Garford v. Clarke* (*d*), for that the defendant's wife ſpoke of the plaintiff's wife *quædam falſa et ſcandaloſa verba quorum tenor ſequitur in hæc verba*; and held not good on a motion in arreſt of judgment, becauſe not an expreſs allegation, that ſhe ſpake the ſame words.

MR. POWEL anſwered, that in the action of *ſcandalum magnat.* brought by his now majeſty, when *duke of York*, againſt *Pilkington* (*e*), it was ſo alledged, but THE COURT and THE BAR ſaid they believed it was not ſo there in that caſe; and the caſe of *Ford v. Teague* (*f*), in this court, about four or five years ſince, caſe for preferring a ſcandalous petition *tenor cujus ſequitur in hæc verba*, was held well enough; it was the *Saltaſh cauſe*, &c.

But THE COURT took a difference between this and that, for there *tenor* ſignifies the ſame thing, and the petition is ſet forth at large; but here *ad effectum* makes nothing, but he ſpoke the ſenſe of the words mentioned in the declaration.

And judgment was accordingly for the defendant, *quod querens nil capiat per billam.*

But *quære*, If the principal caſe was not well enough after a verdict; the *ad effectum* being but ſurpluſage; for it is ſaid "*hæc* "*falſa et ſcandaloſa verba ad effectum ſequent*;" ſo that it is ſufficiently certain, by ſaying "*hæc, &c.*" and the other words, as idle, ought to be rejected: had it been "*quædam verba ad effect. ſequent.*" it had been undoubtedly ill.

But, however, after much debate, judgment was for the defendant in Michaelmas term following, it having been after moved.

* [437]

* NOTE, As to that caſe of the *Duke of York v. Pilkington*, the declaration is not as MR. POWEL alledged, but "*hæc ſcandaloſa verba* "*ſequent*'."

(*c*) But now by ſtatutes 2 Geo. 2. c. 26. and the 6 Geo. 2. c. 14. all law proceedings whatſoever ſhall be in the *Engliſh* tongue and language only.

(*d*) Cro. Eliz. 857.
(*e*) Ante, caſe 244.
(*f*)

Hillman *againſt* Law. Caſe 392.

Trinity Term, 1 *Jac.* 2. *Roll* 549.

A declaration on a bill of exchange, ſtating that the defendant had not paid, *at* or *after* the day of payment, &c. is good.

ACTION on the caſe on a bill of exchange, brought againſt the acceptor by the plaintiff, as adminiſtrator to the party to whom the bill was payable, on the cuſtom of merchants; and breach aſſigned, *præd. tamen* the defendant *ad vel poſt præd. diem*, the day of payment, *non ſolvit nec aliqualiter pro eiſdem hucuſque contentavit.*

Demurrer to the declaration, becauſe did not ſay *non ſolvit* at or before the day, and a payment before the day is a payment at the day.

But held good PER CURIAM, becauſe ſaid *hucuſque non*, &c.

Judgment for the plaintiff.

Atkinſon *againſt* Newton. Caſe 393.

A *ſcire facias* by an *adminiſtrator* againſt an *executor*, on a judgment recovered by the *inteſtate* againſt the *teſtator*, in MIDDLESEX, is good, although it alledge that the adminiſtration was granted in the dioceſs of YORK.

THE PLAINTIFF brings a *ſcire facias* as adminiſtrator of J. S. againſt the defendant as executor of J. N. on a judgment here recovered by the plaintiff's inteſtate againſt the defendant's teſtator, and alledges adminiſtration to be committed to him by the *Archbiſhop of York*. The defendant pleads *plene adminiſtravit*; and verdict for the plaintiff.

MR. GIRDLER moved in arreſt of judgment, that upon the record itſelf it appears that the plaintiff has no title, becauſe it appears thereon that the inteſtate had *bona notabilia* in another dioceſs, *viz.* a judgment here in *Middleſex*; ſo that the adminiſtration, being granted by an inferior dioceſs, it is void, whereas had it been granted by the *Archbiſhop of Canterbury*, the *bona notabilia* only in one dioceſs, it would then be only voidable, becauſe he is the ſuperior; but here it is void, and though it be after verdict, yet here it appears upon record that he had *bona notabilia* in *Middleſex*, and *non conſtat* that he had any at all in *York*, and he cited the caſe of *Byron v. Byron*, in 3 *Cro.* 472.

* Ordered to be moved again. * [438]

And afterwards, when moved again, THE COURT ſaid they had judged it well enough before, and would hear no more; and therefore judgment for the plaintiff. *Tamen quære.*

Baxter

Caſe 394. Baxter *againſt* Pells.

In treſpaſs againſt the *grantee* of a rent-charge for taking cattle, a juſtification under a *diſtreſs* for *rent*, and reaſonable *expences*, "in a certain "cloſe to the "meſſuage "aforeſaid be-"longing," is good, although it be not ſhewn that there was any *attornment*, or that they were the cattle of the plaintiff, or that the expences were reaſonable.

TRESPASS for taking and keeping cattle, *quouſque* he paid ſo much money *et quinaecim ſolidos, &c.*

The defendant pleads a rent arrear, and a diſtreſs for the ſame, and ſo juſtifies; and the plaintiff demurs.

Upon arguing it divers exceptions were taken to the plea.

FIRST, That he ſays *in quodam clauſo eidem præd. meſſuagio pertinent'*. Now land cannot belong to a houſe; and cited the caſe of *Hill v. Grange* (*a*). A cloſe cannot be appendant to a meſſuage.

SECONDLY, The defendant has not ſhewn that there was any *attornment* (*b*), and then he being a grantee cannot diſtrain.

THIRDLY, The defendant does not ſhew that they were the plaintiff's own cattle; and, if they were a ſtranger's, they ought to be *levant et couchant*, otherwiſe they cannot be diſtrained; and ſo is *Doctor and Student*, 15. *Bro. tit. Diſtreſs*, 49. 22 *Edw.* 4.

FOURTHLY, As to the money demanded: they ſay ſo much rent arrear, and fifteen ſhillings *pro rationabilibus expenſis*; they ought to have ſhewn how reaſonable, and how laid out, that ſo the Court may judge if reaſonable; and to have laid *a venue* where laid out, and for what; and ſo is *Yelv.* 49, 50. 1 *Cro.* 486; the ſame law is in caſe of neceſſaries.

MR. NORTHEY *è contra.* We have alledged the rent to be iſſuing out of the cloſe, and the ſaying that the cloſe is appendant is nothing but idle.

SECONDLY, For the attornment, it is not neceſſary to alledge any, for we ſay it was conveyed to us by force of the ſtatute of uſes, and then attornment is not neceſſary.

THIRDLY, As to the *levancy* and *couchancy*, we ſay they were his cattle, and that he was in poſſeſſion.

* [439] * FOURTHLY, As to the *rationabilibus expenſis*, all that is ſurpluſage, for we needed not to have made any anſwer thereto, for the action is not brought of that, it is only in the *quouſque ſolverit*, &c.

JUDGMENT for the defendant.

(*a*) Plowd. 167. Dyer, 130.
(*b*) By 4 & 5 Ann. c. 16. and 11 Geo. 2. c. 19. attornments are no longer neceſſary.

James

James *againſt* Trollop. Caſe 395

Tythes in prender. S. C. 2 Mod. 320. S. C. Pollex. 623. S C. Skin. 51 239. 3 Com. Dig. 8 5 Bac. Abr. 1

ERROR on a judgment in the Common Pleas, on a declaration in *a prohibition*, ſuggeſting a compoſition before the time of memory, and that the ſame had been obſerved ever ſince, &c.

I have not ſeen the pleadings, but the exceptions MR. TRINDER took were theſe:

FIRST, That no layman can be entitled to tythes *in render*, but only by way of retainer, 3 *Cro.* 599. That the grant was in the year 1125, ſo that your deed is pleaded to be in time before the memory of man, of which no iſſue can be taken, nor ever can it be tried, and that time of memory begins from the beginning of *Richard the Second*, and therefore it is not pleadable, *Litt. Sect.* 1 *Edw.* 4. 6. 14 *Hen.* 7. 1. *Abbot of Strata Marcella's caſe*, *Coke's Rep. Bro. Preſcription*, 22. 44 *Edw.* 3. 5. 5 *Aſſiſ.* 5. 8 *Edw.* 4. 13, 14. *Paſch.* 1678. *Hoſkins and Owen's caſe. Bowley v. Atkins, in Hill.* 18, 19 *Car.* 2. *B. R. Rot.* 586.

SECONDLY, Suppoſing that theſe tythes were well veſted by the grant, yet they entered and reveſted again in the parſon, by the *Council of Lateran*, in the year 1215, or elſe by the *diſſolution of monaſteries*.

THIRDLY, They have not ſhewn that the biſhop was party to the compoſition or grant, *Biſhop of Wincheſter's caſe*, 2 *Rep.* 2 *Inſt.* 490, 491. 655. *Regiſt.* 38. *Selden's Hiſtor. Decim.* 302. 2 *Roll. Abr.* 265. *Trin.* 26 *Car.* 2. *Rot.* 461. 471. *Wilkinſon v. Richardſon*; *and* 2 *Roll. Abr.* 306. *tit. Prohibition*, *num.* 20. this is between ſpiritual perſons, 3 *Cro.* 307. & *Moor*, 907. I could not well hear his argument, but theſe authorities he did cite.

MR. HOLT *è contra*. The general queſtion is, Whether this compoſition as pleaded, be good to ſupport this prohibition?

* And as to THE FIRST EXCEPTION argued, That the deed makes no compoſition, becauſe it contains no words of grant in it, and there needs it not, for the ancient way was compoſition, and agreement of rendering *quid pro quo*. * [440]

SECONDLY, That it is not ſaid to be part of the demeſnes of the manors; I think it is ſaid ſo, it is alledged to be the *demeſne*, and in poſſeſſion, and then I hold it to be part of the manors; it muſt be *demeſne*, for it cannot otherwiſe be intended, for the tenancies are not part of the manors. *Mounjoy's caſe*, 5 *Rep.*

THIRDLY, It is true, a layman is not capable of tythes *in prender*; but I think a layman is capable of paying and taking *a modus* in lieu of tythes.

FOURTHLY,

JAMES v. TROLLOP.

FOURTHLY, As for the *Council of Lateran*, I never knew it pleaded in my life: ſome ſay that tythes were payable of right before, but how an eccleſiaſtical conſtitution can inſtitute and create a temporal right is ſomewhat ſtrange; beſides, if this created the parſon's right, it would deſtroy all the preſcriptions and *modus*'s in the nation.

FIFTHLY, The concurrence of the biſhop: that was not neceſſary in this caſe, for he had nothing to do with a priory which has an abſolute eſtate, which a patron has not.

SIXTHLY, As to that of the *diſſolution of monaſteries*, that may as well argue away our lands which we had on this compoſition, as our tythes: and as to the rent, it is neither out of the lands nor out of the tythes; it is a compoſition, and that is a ſufficient anſwer, but this is well here. We might have preſcribed generally, that time out of mind five ſhillings was paid annually in lieu of tythes. Then the ſetting this forth ſo ſpecially is well enough. Whatſoever may have a reaſonable commencement may be good by way of preſcription; a *modus* may be good, payable to another perſon capable of tythes, as well as to the party himſelf, for he may have tythes in kind, and by the ſame reaſon he may have *a modus:* he cited 3 *Cro.* 317. 1 *Cro.* 317. *Litt.* 62. The alledging it in this ſpecial manner is a good way of pleading: ſee *Weſtm.* 1. *cap.* 39. A writ of right was [441] to be brought on a deed. If * this act has ſet up this way of pleading, why may not I, in pleading, purſue the ſtatute? As we have pleaded a deed from before time of memory, ſo we have pleaded an uſage from thence, which is time out of mind: ſuppoſe we had ſaid, that a long time before the firſt year of *Richard the Firſt*, and ever ſince, we had paid, &c. that would have been good, becauſe in purſuance of the ſtatute: it is moſt true, we are not to plead a deed before time of memory, and ſo to rely on the deed, as to ſay *virtute* of the deed we had been diſcharged of, &c. but when we come and plead the uſage that we rely on, the deſign of the ſtatute was not to take away right in poſſeſſion, but to prevent the ſetting up old dormant titles by deeds where the poſſeſſion has been otherwiſe: ſuppoſe an ancient charter before the time of *Richard the Firſt*, for felons goods, that cannot be pleaded; but ſuppoſe a confirmation ſince, then the charter with the confirmation may be pleaded; or ſuppoſe an allowance in *eyre* ſince: he cited *F. N. B.* 91. *k.* 8 *Edw.* 4. 13, 14. and ſo he prayed the judgment might be affirmed.

THE COURT. The ſole objection againſt this preſcription is, becauſe it ſhews the reaſon of the preſcription. If they had relied on the deed it might be otherwiſe: the *Council of Lateran* can affect nothing in this matter, &c.

JUDGMENT was affirmed.

Claxton

Claxton *againſt* Swift. Caſe 396.

Hilary Term, 36 & 37 *Car.* 2. *Roll.* 1163.

CASE on the cuſtom of merchants on a bill of exchange brought by the plaintiff, being the indorſee, againſt the defendant as the laſt indorſer, who pleads that the plaintiff has ſued and recovered againſt the original drawer, which judgment is in force; the plaintiff demurs.

If the *indorſee* of a bill of exchange, on default of payment by the *acceptor*, recovers againſt the *drawer*, but do not take out execution, this recovery cannot be pleaded in bar to a ſecond action on the ſame bill by the ſame *indorſer* againſt the *laſt indorſer*; for although he recovered *damages* in the firſt action, he did not receive *ſatisfaction*.

Vide Poſt, caſe 426. 462. Ante, caſe 389. 400.
S. C. Poſt, 494.
S. C. 3 Mod. 86.
S. C. 1 Lut. 878.
S. C. N. Lut. 270.
S. C. Skin. 255.
Dougl. 250.
1 Term Rep. 167.
4 Term Rep. 691.
1 H. Bl. Rep. 91. notis.

MR. THOMPSON *for the plaintiff* argued, that the plaintiff has his election to ſue the drawer or the indorſer, and is not concluded till ſatisfaction: beſides, we have laid another cuſtom than that againſt the drawer, ſo as they are diſtinct. In the ſuit which they have pleaded, there was likewiſe an *indebitatus aſſumpſit* and entire damages given, ſo that it can be * no anſwer to ours. It is a recovery for more, and conſequently not for the ſame thing.

MR. POLLEXFEN *è contra*. It is the ſame bill of exchange, and the *indebitatus* cannot hurt, for this would have been a good plea for the ſame party. Then as to the objection of its being another cuſtom, it is true, they are ſeveral cuſtoms, but yet ſurely a ſatisfaction by one of them would be a bar. And as to the merits, it is true, he has his election; but by thus bringing his action he has made his election, and he ſhall not now go back to the others, for that would deprive ſome of them of their remedies. This is not a joint action, nor can it be brought againſt them all. Suppoſe a treſpaſs be done by ſeveral, and the party injured bring an action againſt one of them, and recover judgment againſt that one, it founding in damages, he cannot afterwards bring an action againſt any other of them (*a*): ſuppoſe A. owes money to C. and delivers money to B. for to pay to C. and the money is not paid, and C. brings his action againſt A. and recovers this money, he ſhall never bring his action againſt B. becauſe he has determined his election.

HERBERT *Chief Juſtice* ſaid, That ſatisfaction ſeems to be the thing that makes the difference.

WYTHENS *Juſtice*. Election is to chooſe one or the other, and not every one of them ſucceſſively: now *tranſit in rem judicatam*.

Adjournatur (*b*).

* [442]

(*a*) See the caſe of Brown v. Wotton, Cro. Jac. 73. S. C. Yelv. 67.

(*b*) See S. C. Poſt, 494.

Caſe 397. Burdet *againſt* Procter.

Hilary Term, 36 & 37 *Car.* 2: *Roll.* 190.

In covenant on an indenture to find an apprentice meat, drink, and other neceſſaries, a breach aſſigned generally that he did not find meat, drink, and other neceſſaries, is good.

Poſt, 472.
2 Lev. 94.
Hard. 132.
1 Ld. Ray. 106. 478.
2 Stra. 227.
3 Wilſ. 530.
Dougl. 214.
Cowp. 665. 727.

ERROR. Covenant on an apprentice's indenture, to find meat, drink, waſhing, lodging, and other neceſſaries: the breach was aſſigned in the direct negative, that he did not find meat, drink, waſhing, lodging, and other neceſſaries *per ſpatium*, &c. The defendant demurs.

Alledged that the breach was too large, and this very breach has been held naught in the caſe of *Mills v. Aſtel* (*a*), as being too general; and the rule that where the covenant is general, * the breach may be ſo too, as in the caſes of *Salmon v. Bradſhaw* (*b*); *Muſcot v. Ballet* (*c*), *Chantflower v. Prieſtly* (*d*), reaches not this caſe, for all thoſe caſes are of covenants to enjoy; there it lies not in the party's knowledge.

* [443]

HERBERT *Chief Juſtice*. The pleading of "all neceſſaries" is well enough, for to particularize them would be infinite, and here is a judgment in the Common Pleas.

The judgment was affirmed.

The like caſe *Plomer v. Plaiſted* (*e*), which I argued.

(*a*) Cro. Jac. 486.
(*b*) Cro. Jac. 304.
(*c*) Cro. Jac. 369.
(*d*) Cro. Eliz. 914. S. C. Noy. 50.
(*e*) Poſt, 472.

Caſe 398. Roberts *againſt* Holt.

The conſignee of a bill of lading is by cuſtom liable for the freight.

CASE, declaring on the cuſtom of merchants, that if a merchant in *Ireland* conſign goods to a merchant in *London*, and the maſter ſign a *bill of lading*, the merchant here ſhall be liable for freight; AND HELD a good cuſtom.

Caſe 399. Pawling *againſt* Ludlow.

To debt on a *bail-bond*, a PLEA that before the day of appearance, the defendant ſurrendered in diſcharge of the bail, is good.

DEBT on a bail-bond given upon an arreſt in an inferior court.

The defendant pleads, that before the day of appearance mentioned in the condition, he was rendered to the gaoler there, and there continued till a *ſuperſedeas* came.

S. C. 3 Mod. 87. 1 Roll Abr. 3 Bulſt. 191. 2 Term Rep. 757.

The

The plaintiff demurs.

PAWLING v. LUDLOW.

THE COURT. The plea is good; for ſuppoſe no bail-bond had been given at all, and then he had lain in priſon: you had as much the fruit of your ſuit as upon the bail: you had the body, and might have brought him up hither (*a*): why may he not render him to the officer in diſcharge of the bond before the day of appearance as in the caſe of a recognizance.

Judgment for the defendant.

(*a*) 6 Mod. 238. Tidd's Practice, 147.

Gawen *againſt* Surby. Caſe 400.

Trinity Term, 35 *Car.* 2. *Roll* 1118.

TRESPASS of a battery, &c. The defendant after an imparlance *ſalvo, &c.* pleads an *outlawry*; the plaintiff demurs; and judgment of *reſpondeas ouſter*. And after * plea of *not guilty*, and verdict and judgment for the plaintiff, judgment was affirmed, on a writ of error, in the Exchequer Chamber.

The words *venit et defendit vim et injuriam quando, &c.* make a *full defence*; and after ſuch defence a defendant cannot plead *outlawry* in diſability of the plaintiff, although a *ſpecial imparlance* has been given to him.

S. C. 1 Lut. 5. S. C. N. Lut. 2.

* [444]

MR. GRIDLER, *for the writ of error*, argued, that *the bill* was of *Hilary term*, and *the imparlance* till *Trinity term*, and the defendant has taken upon him a full defence by a *defendit vim et injuriam quando, &c.*; and after ſuch defence he cannot plead in abatement (*a*). He cannot plead an outlawry in abatement after imparlance, and day given to another term (*b*). But if it be objected that this is a *ſpecial imparlance*, I anſwer, that he cannot after a ſpecial imparlance (*c*). By the *ſalvo* is only intended ſuch exceptions as the law gives to the writ; not privilege of Chancery, &c. The words of the *ſalvo* are, "*Salvo ſibi omnimodis exceptionibus ad billam præd.* "*habuit licentiam interloquendi ad eandem et tunc ad reſpondend. &c.*" All that this contains are exceptions to the bill. Outlawry in the plaintiff is not an exception to the bill, nor an anſwer to the bill, but to keep himſelf from anſwering, and that is contrary to the words of the *ſalvo*, for thereby he is to anſwer to the bill (*d*). After imparlance a man is eſtopped to plead outlawry in diſability (*e*). Here he admits the juriſdiction of the court, and that there is ſuch a perſon who ſues, and after ſuch an imparlance he cannot plead "no "ſuch perſon as the plaintiff;" for that is admitted; and ſuch plea ought to be before imparlance (*f*). The *ſalvo, &c.* is only to the form or matter of the writ or count; as another action pending, variance, jointenancy, coparcenary, tender, and refuſal, &c. Alſo at the day

(*a*) Year Book, 8 Hen. 6. pl. 3. Thompſon's Pleadings, 8, 9.
(*b*) Year Books, 35 Hen. 6. pl. 36, 37. 22 Edw. 4. pl. 36.
(*c*) Year Book, 22 Hen. 6. pl. 7.
(*d*) Brook. Abrid. "Eſtoppel," 24.
(*e*) See Herne's Pleader, title, "Utlagary," 3. and Herne, "Villenage," 6.
(*f*) By BRIAN *Juſtice*, in the Year Book, 16 Edw. 4. pl. 4. Bro. Abr. "Continuance," 75. and ſee the caſe of Markham v. Pitt, 3 Leon. 205.

GAWEN v. SURBY.

* [445]

of the imparlance, ended by the *quando*, &c., he admits him of ability again; for disability, or nonability, are the same with *non-entity*, or no such person *in rerum natura*; it is as a civil death, &c. It would be strange after an imparlance to plead "*nul tiel personne*;" so would it be as strange after having admitted * him of ability by the *quando* &c.; for this is a full defence, and he has taken upon him to answer (*g*). He who pleads to the person shall defend the tort and force, but not the damage, &c. *vim et injuriam*, but shall not say *quando*, &c. *et sic vide*, says that book (*h*). He that pleads to the person shall not make a full defence (*i*). The defendant defends the *force and injury*, and demands judgment if he shall be answered, because he was his villein; and shews how, &c. *et sic inde* that he shall not make a full defence when he pleads to the person, &c. and shall not say these words, "*quando*, &c." for that goes to the damages, and is a full defence, and agrees with the text of LITTLETON (*k*), *viz.* That he shall not make full defence, but only defend the force and injury, and demand judgment if he shall be answered. In *Brook* (*l*), "Villenage" is pleaded; there is only a defence of the force and injury, and demand of judgment if he shall be answered: so *Finch's Law* (*m*). After special imparlance he shall plead to the writ or count, and not to the jurisdiction or person. For precedents, see *Rastal* (*n*). An ejectment *venit et defendit vim et injuriam*, &c. *et dicit quod querens est alien.* In *Coke* (*o*) in debt the defendant *venit et dicit quod*, and pleads the outlawry in disability. In *Herne* (*p*), *venit et dicit quod*, &c. in the same book *venit et dicit* (*q*), and four several number-rolls there cited.

MR. POWYS contended that "the defendant *vim et injuriam*," &c. implied a *quando*, and that it was all one, and cited *Rastal* (*r*), in a FORMEDON *quod querens est monachus*, and there *injuriam quando*, &c. and the like *Rastal*, 482. and the like *Rastal*, 663. and in *Brownlow* (*s*).

But THE COURT insisted that *quando* did make a *full defence*, and then the plea was too late. And the judgment was affirmed (*t*).

(*g*) Bro. Abr. "Defence," 12. Year Book, 35 Hen. 6. pl. 12.
(*h*)
(*i*) Bro. Abr. "Defence," 20. Year Book, 20 Edw. 3. pl. 36.
(*k*) Sect. 195.
(*l*) Bro. Abr. "Defence," 29.
(*m*) Finch, b. 4. ch. "of Continuances," page 435.
(*n*) Rastal's Entries, 252.
(*o*) Co. Ent. 159.
(*p*) Herne's Pleader, 3.
(*q*) Herne's Pleader, 6.
(*r*) Rastal's Ent. 368. pl. 1.
(*s*) 1 Brownl. 15.
(*t*) See Clapham v. Lenthall, Hardres, 365. where in debt upon an escape after execution, the defendant appeared *et defendit vim et injuriam quando*, &c. and imparled specially, and the Court held that this was not a full defence. But in the case of Trundal v. Trowell, Stiles, 275. these words are held to make a full defence; and in Britton v. Gradon, 1 Ld. Ray. 117. it is held, that a defendant cannot plead in disability of the person after a full defence: and said to be now settled, in the case of Thompson v. Stockdale, Hilary term, 23 Geo. 3. that in all dilatory pleas, except such as go to the jurisdiction of the court, a *full defence* must be made.

Dawling

* Dawling *againſt* Wenman.

Caſe 401.

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SLANDER, That whereas the plaintiff was a pious, juſt, &c. the defendant did, to ſcandalize him, make a falſe and ſcandalous *affidavit* in Chancery, in which were many falſe and ſcandalous words, &c. And that afterwards *tali die, anno, et loco*, of his further malice, he ſpoke other falſe, ſcandalous, &c. and verdict for the plaintiff, and entire damages given.

An action will not lie for ſlander in an affidavit made in a cauſe in Chancery.

S. C. 3 Mod. 108.
1 Lev. 119.
Hard. 221.
1 Leon. 107.
1 Bac. Abr. 67.
2 Peer Wms. 406.

And on motion the judgment was arreſted, becauſe an action will not lie for a falſe oath in Chancery, &c.

Judgment for the defendant. *See Harding v. Bodman, Hutt.* 11. *and Eyres v. Sedgwick, Cro. Jac.* 601.

Blanchard *againſt* Dyer.

Caſe 402.

DEBT *for rent* brought by the plaintiff, being a tenant in common with J. S. of the lands demiſed, for a moiety of the rent.

One tenant in common cannot bring debt for his portion of the rent.

Cro. Jac. 231.
1 Sid. 49.
Cro. Eliz. 402.
3 Bac. Abr. 217.
4 Burr. 2141.

AND HELD that it does not lie, according to *Littleton's Text, ſect.* 316. becauſe it is in the perſonalty.

So held by THE WHOLE COURT upon debate on motion in arreſt of judgment.

Macbeth *againſt* Cobb.

Caſe 403.

Michaelmas Term, 36 *Car.* 2. *Roll* 48.

ACTION of debt; the defendant pleads one of the common *letters of licence*, under the hand and ſeal of the plaintiff, whereby he gives the defendant liberty for three months, and covenants, that if he ſhould ſue or moleſt him in that time, the defendant ſhould be acquitted of the debt; and that he did ſue him, &c. The plaintiff demurs.

A *letter of licence* given to a debtor, covenanting not to moleſt him for three months, is a *releaſe* upon condition.

Raym. 457.
Jones, 158.

The queſtion was, Whether this amounts to *a releaſe*.

And held by THE COURT, that it being under ſeal, and the plaintiff's own agreement, it was not barely *a covenant*, but *a releaſe* upon condition.

And accordingly judgment was given for the defendant (*a*).

(*a*) But ſee the caſe of Heathcote and others v. Crookſhanks, Trinity term, 27 Geo. 3. where it is determined that an agreement between a debtor and his creditors, that they will accept a compoſition in ſatisfaction of their reſpective debts, to be paid in a reaſonable time, cannot be pleaded to an action brought by one of the creditors to recover his whole demand. 2 Term Rep. 24.

Caſe 404.

* [447]

Simony.

Ante, 167.

* Maſon *againſt* Smith.

PROHIBITION prayed to the eccleſiaſtical court there for *ſimony*, it being in order to deprivation.

Adjournatur.—Vide infra.

Caſe 405.

Dennis *againſt* Eſhley.

"*Quod cum*" is bad in *treſpaſs*, but good in *caſe* or *debt*.

Ante, 27. 295.

2 Wiſ. 203.

REPLEVIN. Motion in arreſt of judgment, for that there was, in the declaration, no expreſs averment of the taking, but only by a *quod cum*, which, in *treſpaſs*, is naught; though in *caſe* or *debt* it be well enough.

Ordered to ſtay till moved on the other ſide.

Caſe 406.

Blanch *againſt* Gabard.

Non devaſtavit ad valor. ill.

Cro. Car. 84.

Dyer, 115. 370.

2 TermRep. 666.

4 TermRep. 558.

3 TermRep. 643.

ON a ſpecial iſſue, after verdict, IT WAS HELD naught, for the defendant to ſay "*non devaſtavit ad valor.*" as the plaintiff had alledged; becauſe he did not ſay *nec aliquam inde parcel.* for if part were waſted the plaintiff ſhall recover ſo much, as well as on a *plene adminiſtravit*, if aſſets be found to part of the debt.

Caſe 407.

The King *againſt* Sparkes.

Error on indictment, for uſing other prayers than in the liturgy, &c.

S. C. 3 Mod. 78.

DEVON. *ſſ.* *DOMINUS rex mandavit cuſtodibus pacis ſuæ in com. Devon. ac juſticiariis ſuis ad diverſ. felon. tranſgreſſion. et alia malefacta in eodem com. perpetrat. audiend. et terminand. aſſignat. breve ſuum clauſum in hæc verba ſſ.* DEVON. *ſſ.* CAROLUS SECUNDUS *dei gratia Angliæ, Scotiæ, Franciæ, et Hiberniæ rex fidei defenſor, &c. cuſtodibus pacis ſuæ in com. Devon. ac juſticiariis ſuis ad diverſ. felon. tranſgreſſion. et alia malefacta in eodem com. perpetrat. audiend. et terminand. aſſignat. et eorum cuilibet ſalutem* QUIA *in recordo et proceſſu conviction.* RICHARDI SPARKE * *de* NORTHLEIGH *in com.* DEVON. *cler. pro quibuſdam tranſgreſſion. et contempt. contra formam ſtatut. pro uniformitat. commun. precation. et ſervit. in eccleſia et pro adminiſtration. ſacrament. edit. unde indictatus eſt et ſuperinde per quandam juratam patriæ capt. coram nobis convict. eſt ut aicitur error intervenit manifeſtus ad grave damnum ipſius* RICHARDI *ſicut ex querela ſua accepimus* NOS *errorem ſi quis fuit modo debito corrigi et eidem* RICHARDO *plenam et celerem juſtitiam fieri volentes in hac parte vob. mandamus quod ſi judicium inde redditum ſit tunc record. et proceſſ. præd. cum omnibus ea tangen. nobis*

* [448]

jub

ſub ſigillis veſtris vel unius veſtrum diſtincte et aperte mittatis et hoc breve ita quod ea habeamus a die Sancti Martini in quindecim dies ubicunque tunc fuerimus in Angliæ ut inſpect. record. et proceſſ. præd. ulterius inde pro errore illo corrigend. fieri faciamus quod de jure et ſecundum legem et conſuetud. regni noſtri Angliæ fuerit faciend. teſte MEIPSO *apud Weſtm. 11 Novemb. anno regni noſtri* 36.

Which being returned and diſcontinued by the demiſe of the king (as was conceived) A WRIT OF ERROR *coram nobis* was brought.

The record was: MEMORAND. *quod ad generalem quarterialem ſeſſion. pacis domini regis tent. apud* CASTRUM EXON. *in et pro com. præd. decimo quinto die Julii anno regni domini Caroli Secundi dei gratia Angliæ, Scotiæ, Franciæ, et Hiberniæ regis fidei defenſor', &c. triceſimo ſexto coram* JOHANNE BEARE, JOHANNE NORTHCOTE, JOHANNE QUICK, *et* HUGONE STAFFORD *arm. ac aliis ſociis ſuis juſtic. dict. domini regis ad pacem in com. præd. conſervand. necnon ad diverſ. felon. tranſgreſſ. et al. malefact. in eodem com. perpetrat. audiend. et terminand. aſſignat. per ſacrament. duodecim jurator. proborum et legal. homin. com. præd. jurat. et onerat. ad inquirend. pro dicto domino rege et corpore com. præd. exiſtit præſentat. quod* RICHARDUS SPARKE *de* NORTHLEIGH *in com. præd. clericus exiſtens rector miniſter ſive vicarius eccleſiæ parochialis de* NORTHLEIGH *præd. in com. præd. et veram examinat. in eadem par. aſſumens decimo tertio die Julii anno regni domini noſtri Caroli Secundi dei gratia Angliæ, Scotiæ, Franciæ, et Hiberniæ regis fidei defenſor', &c.* 36. *ac diverſis aliis diebus et vicibus apud* NORTHLEIGH *præd. in com. præd. machinans et intendens derogare et deprivare convenient. et neceſſar. ordin. ritus et modum* ANGLICE the meet order, manner and faſhion *communi. et apertæ precationis appunctuat. habend. et tenend. in omnibus eccleſiis parochial. et capellis infra hoc regnum Angliæ ſpecificat. in quodam libro* * *intitulat.* "The Book of Common Prayer and Ad- * [449]
"miniſtration of the Sacraments," *eodem decimo tertio die Julii anno ſuprad. exiſtent. aie dominico ac diverſis aliis diebus dominicis præantea in tempore divini ſervitii ante meridiem ejuſdem diei ac alior. eorundem dominicor. dierum præd. in eccleſia parochiali de* NORTHLEIGH *præd. habit. adtunc et ibid. vi et armis, &c. voluntarie et illicite quaſdam alias preces quam commun. precat. præd. in eodem libro intitulat.* "The "Book of Common Prayer," *ut prefertur ac alio modo quam per eundem appunctuat. fuit palam publice voluntarie et illicite dixit habuit et repetivit et uſus fuit ſeparalibus ligeis dicti domini regis adtunc et ibidem præſentibus in contempt. dicti domini regis nunc in malum exemplum omnium alior. ſubditor. dict. domini regis in hujuſmodi caſu delinquent. contra formam ſtatut. in hujuſmodi caſu edit. et proviſ. ac contra pacem dict. domini regis nunc coron. et dignitat. ſuas, &c. —Super quo præcept. fuit vicecom. com. præd. per eandem cur. quod non omitteret, &c. quin venire faceret eundem* RICHARDUM SPARKE *ad reſpondend', &c. poſteaq; ſcilicet præd. decimo quinto die Julii anno* 36. *ſuprad. coram præfat. juſticiar. venit* RICHARD. SPARKE *in propria perſona ſua et habito auditu indictament. præd. dixit quod ipſe*

* Maſon *againſt* Smith.

Caſe 404. [447]
Simony.
Ante, 167.

PROHIBITION prayed to the eccleſiaſtic[redacted] *ſimony*, it being in order to deprivation.

Adjournatur.—Vide infra.

Dennis *againſt* E[redacted]

Caſe 405.

"*Quod cum*" is bad in *treſpaſs*, but good in *caſe* or *debt*.
Ante, 27. 295.
2 Will. 203.

REPLEVIN. Motion in arreſt o[f] in the declaration, no expreſs a[v] by a *quod cum*, which, in *treſpaſs*, i[s] be well enough.

Ordered to ſtay till moved c[redacted]

Blar[redacted]

Caſe 406.

Non demoſtravit ad valer. ill.
Cro. Car. 84.
Dyer, 115. 370.
2 TermRep. 666.
4 TermRep. 558.
3 TermRep. 643.

ON a ſpecial iſſue, [redacted] defendant to ſa[y] had alledged; becau[ſe] part were waſted t[hey] *plene adminiſtrav[erunt]*

[redacted] *W. L[redacted]*
[redacted] *qui ad veritat[em]*
[redacted] *ſuper ſacr'um ſuum q[uod]*
[redacted] *eſt de tranſgreſ. et contemp[t.]*
[redacted] *perius ſpecificat. modo et forma pred[icta]*
[redacted] *rius verſus eum ſupponitur ſuper quo viſ[us]*
[redacted] *lectis omnibus et ſingulis præmiſſis conſid[erat]*
[redacted] RICHARDUS SPARKE *forisfac. et deb. et ſo[luit]*
[redacted] *tranſgr. et contempt. præd. centum marcas [et]*
[redacted] DUS SPARKE *ſummam cent. marcar. per ipſum*
[redacted] *regi forisfact. non ſolvet prout ſolvi debeat*
[redacted] *S. non ſolvens præd. ſummam cent. marcar. in*
[redacted] *ad ſatisfaciend. dicto domino regi de fine ſuo pr[o]*
[redacted] *et contempt. prædict', &c.*

Caſe 407.

Error on indictment, for uſing other prayers than in the liturgy, &c.
S. C. 3 Mod. 78.

DEVON. [redacted] *tranſg[reſſ.]* [redacted] *term[inum]* [redacted] *C[ur]* [redacted] *bu[ſ]*

THE CASE.

[redacted] ERROR to reverſe a judgment given at the quarter ſe[ſſions] [redacted] held for the county of *Devon*, for the payme[nt] [redacted] marks fine againſt the defendant; he being there [redacted] indictment on an indictment, for that being miniſter or [redacted] did, on the Lord's Day, uſe *other prayer* [redacted] COMMON PRAYER, &c."

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non eſt inde culpabilis et de hoc pon. ſe ſuper patriam, et HUGO VAUGHAN *arm. adtunc et ibid. exiſtens clericus pacis com. præd. qui pro domino rege ſequitur in hac parte ſimiliter ideo ven. inde jurat. coram juſticiariis dict. domini regis ad pacem in com. præd. conſervand. ac ad diverſ. felon. tranſgreſſ. et al' malefacta in eodem com. perpetrat. audiend. et terminand. aſſign. ad general. quarterial. ſeſſion. pacis dom. regis tent. apud* CASTRUM EXON. *in et pro com. præd. die Martis poſt feſtum Sancti Michaelis Archangeli tunc proxim. futur. exiſten. ſeptimo die Octobris anno regni dict. domini regis nunc triceſimo ſuprad. et qui, &c. ad recogn', &c. quia tam, &c. idem dies datus eſt tam præfat.* HUGONI VAUGHAN *qui ſequitur, &c. quam præfat.* RICHARDO SPARKE *ad quam quidem general. quarterial. ſeſſion. pacis domini regis tent. apud* CASTRUM EXON. *in et pro com. præd. ſeptimo die Octobris anno regni dict. domini regis nunc* 36. *ſuprad. coram* JOHANNE BEARE, JOHANNE NORTHCOTE, JOHANNE QUICK, and HUGONE STAFFORD *ac al. ſociis ſuis juſticiariis dict. domini regis ad pacem in com. præd. conſervand. ac ad diverſ. felon', &c. venit tam præfat.* HUGO VAUGHAN *qui ſequitur, &c. quam præfat.* RICHARDUS SPARKE *in propria perſona ſua et juratores jurat. præd. per* JOHANNEM KELLAND. *arm. vicecom.* [450] *com. præd. ad * hoc retornat. impanellat. et exact.* VIZ. *W. L. &c. probi et legales homines com. præd. ſimilit. venerunt qui ad veritat. de præmiſſis dicend. electi triat. et jurat. dicunt ſuper ſacr'um ſuum quod præd.* RICHARDUS SPARKE *culpabilis eſt de tranſgreſ. et contempt. præd. in indictament. præd. ſuperius ſpecificat. modo et forma prout per indictament. præd. ſuperius verſus eum ſupponitur ſuper quo viſis et per cur. hic plenius intellectis omnibus et ſingulis præmiſſis conſideratum eſt quod præd.* RICHARDUS SPARKE *forisfac. et deb. et ſolv. dicto dom. regi pro tranſgr. et contempt. præd. centum marcas et ſi præd.* RICHARDUS SPARKE *ſummam cent. marcar. per ipſum in forma præd. domino regi forisfact. non ſolvet prout ſolvi debeat quod tunc præd. R. S. non ſolvens præd. ſummam cent. marcar. in forma præd. capiatur ad ſatisfaciend. dicto domino regi de fine ſuo prædict. occaſione tranſgreſ. et contempt. prædict', &c.*

THE CASE.

An indictment lies at ſeſſions on 1 Eliz. c. 2. and 13 & 14 Car. 2. c. 4. for uſing other than the *common prayers*.

2 Roll Abr. 222. Poph. 59. 1 Hawk. P. C. 14. 1 Ld. Ray. 347. 682. 2 Ld. Ray. 1039.

ERROR to reverſe a judgment given at the quarter ſeſſions of the peace, held for the county of *Devon*, for the payment of one hundred marks fine againſt the defendant; he being there convicted by verdict on an indictment, for that being miniſter or curate of ſuch a place, he did, on the Lord's Day, uſe *other prayers* than according to "THE BOOK OF COMMON PRAYER, &c."

Several errors were aſſigned upon record, as that the juſtices of peace had no cognizance of the offence, &c.

But the errors inſiſted upon by MR. POLLEXFEN and MYSELF, of counſel for *Richard Sparke* were theſe.

FIRST, That the juſtices of the peace have no juriſdiction of this crime,

crime, it being a *new offence* created by ſtatute, and none but juſtices of *oyer and terminer*, or *judges of aſſize*, could examine and puniſh theſe offences; as by 1 *Eliz. c.* 2. *ſ.* 17.

To which it was anſwered, that they had a power given them by 23 *Eliz. c.* 1.

Then ANOTHER ERROR was alledged in the judgment, that if on the ſtatute of 2 and 3 *Edw.* 6. *c.* 1. the firſt offence is forfeiture of the beſt benefice, and impriſonment for ſix months, and on 1 *Eliz. c.* 2. it is the like, but in no ſort fineable; which was agreed.

A fine cannot be impoſed under any ſtatute preſcribing a *particular forfeiture.*

But MR. CORYTON *for the proſecutor* urged, That this was an offence againſt the 14 *Car.* 2. *c.* 4. where there is a general prohibition, not to uſe any other form, and then a fine may be ſet.

An indictment will lie on a *prohibitory clauſe* in a ſtatute.

——See Rex v Marriott, 1 Show. 398. 4 Mod. 144.

* To that WE anſwered, that this indictment could not be made good upon that law, becauſe it does not ſet forth what the prayers were that we did uſe, ſo that *non conſtat* to the Court, though it might to the jury, that they were different from the Book of Common Prayer.

An indictment for uſing another form of prayer than that preſcribed by 1 Eliz. c. 2. muſt ſtate that it was uſed *inſtead* of the common prayer.

* [451]

Which objection HERBERT *Chief Juſtice* and HOLLOWAY took, ſaying that it might be a prayer before ſermon, and yet he might uſe the common prayer (and ſo in truth the fact was) and therefore they held it no offence, unleſs it had been alledged that he did not read the common prayer.

But WYTHENS *Juſtice hæſitavit.*

Then I URGED, that in truth they could bring this indictment within none of the ſtatutes concerning theſe matters, but if they inſiſted on this of the 14 *Car.* 2. *c.* 4. then the ſtatute 23 *Eliz. c.* 1. which gave the juſtices a juriſdiction, could not reach this; which as they themſelves contend, is an offence made by a ſubſequent law, *viz.* 14 *Car.* 2.

Vide 1 Leon. 241. 2 Leon. 5.

CORYTON not being ready to anſwer this,

WYTHENS *Juſtice* ſaid, Let it be reverſed for that, and, ſays the LORD HERBERT, for the other too.

And ſo we had judgment reverſed.

NOTE, This was a malicious proſecution, for it was only a prayer in the pulpit, and the common prayer was conſtantly read, and it had a fate accordingly; for no doubt if it had been an offence within this act of uniformity, the juſtices would have had conuſance of it; for by the twenty-fourth ſection, all ſtatutes concerning the former book of *Queen Elizabeth*, are enacted to be in force as to this book now uſed.

This proſecution alarmed moſt of the clergy, but the Lord Chief Juſtice's opinion gave them ſatisfaction; which in truth was founded on a great deal of reaſon.

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But in truth the deſign of the *act of uniformity* in that prohibition, was to make a deprivation, &c. and not a temporal offence, or ſubject the party to an indictment (*a*).

(*a*) See 1 Will. & Mary, c. 18. ſ. 8.

Caſe 408.

* [452]

* Rous and his Wife *againſt* White.

In the Court of Chancery.

If two jointenants of a term of years enter into an agreement that no advantage ſhall be taken of ſurvivorſhip, but that whoever died firſt his executor, adminiſtrator, or aſſignee, ſhould enjoy the intereſt of the party dying; and one of them deviſes his moiety to A. and B. his two children, they paying £. 25. a year out of the profits, each of them £. 12. 10s. *Quære*, if the two children ſhall hold this moiety in jointenancy. Co. Lit. 182. 281. 5 Co. 9. 2 Vern. 556.

THE caſe was, A. and B. take a leaſe from *Chriſt Church Hoſpital*, to them two for a long term of years; and, by articles between them, it was agreed, that there ſhould be no advantage taken of ſurvivorſhip, but that whoſoever died firſt, his executor, adminiſtrator, or aſſignee, ſhould have and enjoy the intereſt of the party ſo dying. Then B. by will deviſed her moiety to C. and D. her two daughters, paying twenty-five pounds a year to J. S. out of the profits, each twelve pounds ten ſhillings.

Upon a demurrer before NORTH *Lord Keeper*, I ARGUED, that a *jointenancy* may be of a chattel, and that this creates one; for they come to it by one and the ſame joint means and title; and therefore C. dying, D. ought to have the whole moiety by ſurvivorſhip. The deviſe here is the original of both their intereſts; the eſtate of both is the ſame. If it was in a deed it would be no great queſtion, and in a deviſe it muſt be ſo too, unleſs there be words of ſeveralty, or the teſtator had, ſome way or other, declared his intention that they ſhould take and hold by moieties, of which here is none; no words "divided, or to be divided;" or the like: and the words "paying "twenty-five pounds yearly out of it," alters not the caſe, for that is an incumbrance on the whole, and the ſubſequent words, "each twelve pounds ten ſhillings," are only explanatory of the former, and will make no difference; for it is no more than declarative of what is implied in the former words, on which the law would have directed the ſame thing, *viz.* that each ſhould bear her portion or ſhare; it is no declaration of the teſtator's intention how they ſhould take, but barely directs how that annual ſum ſhould be paid; and the party to whom the ſame is payable, ſhould have the whole out of the houſes, though one had releaſed or aſſigned to her companion; and the houſes would ſtand chargeable with the whole twenty-five pounds, as an incumbrance on them into whoſe hands ſoever they come, whether aſſignee or ſurvivor; it not being a perſonal charge, * condition, or penalty on the deviſees, but laid upon the houſes, and to be and iſſue out of the rents, iſſues, and profits of the term. And ſuppoſing it only an equitable intereſt in *Elizabeth White*, the mother and teſtatrix, and ſhe deviſes it thus; that will not alter the caſe, but ſurvivorſhip ſhall take place there as well as in a caſe at law. Survivorſhip is not ſo unconſcionable a thing as to be excluded out of all equitable eſtates,

* [453]

for

Rous v. White.

for the benefit thereof is equal to both, and the contingency is alike, and ſhe might have ſurvived my client, as well as my client might have and hath ſurvived her; ſo that there is no hardſhip in the caſe on any pretence of inequality. Survivorſhip is a title allowed even in debts, and contracts, and obligations and recognizances. If they had been joint purchaſers for a valuable conſideration, paid by them *ſhare and ſhare alike*, there had been more colour of equity, becauſe by the caſualty the executor would have loſt both the intereſt of the term and the money too, which otherwiſe would have come to the perſonal eſtate, and have been aſſets to have paid debts; but here are no debts pretended, and all is *gratis* given to them by the free good will of the teſtatrix, and they muſt take it in ſuch manner as the law directs upon ſuch a will. And it cannot be thought that ſhe deſigned any otherwiſe; for if the intention had been to have given ſeveral moieties, it would have been ſo expreſſed, for ſhe knew the difference between a jointenancy and a tenancy in common; ſhe was conuſant of the right of ſurvivorſhip, as is apparent by the wording of the will, for ſhe there recites her power to diſpoſe of her intereſt, although but a jointenant, which was by an original agreement at the time of the purchaſe of the leaſe from the hoſpital; and if ſhe had intended her legatees ſhould have had the ſame power, ſhe would have ſaid ſo.

ON THE OTHER SIDE *it was inſiſted*, that, in equitable eſtates, ſurvivorſhip ought not to be allowed, it being againſt all equity, that one ſhould go away with the whole.

* To which LORD NORTH replied, that he knew no inequality in the thing, nor any reaſon againſt it. But however, he would not declare any opinion therein of a ſudden, and therefore would reſerve the benefit thereof to the hearing. * [454]

But the caſe was afterwards compounded.

Venners *againſt* Allen. Caſe 409.

A *libel* will not lie in the ſpiritual court for ſaying "you "are a rogue, "and have "hired fellows "to ſwear "falſe," for it is puniſhable by 5 Eliz. c. 9.

PROHIBITION. The defendant libelled againſt my client in the court-chriſtian, for defamation by theſe words, "You are "a rogue and a raſcal, and have hired fellows to ſwear falſe."

I MOVED for *a prohibition*, for that,

FIRST, They are words of heat and paſſion, and therefore a prohibition ought to go upon that account.

And, SECONDLY, If they ſhould not be deemed words of anger, but adviſed and malicious, then they ought not to have conuſance of them, becauſe they import an offence againſt a ſtatute-law; and where no ſuit lies for the principal in their court, there no libel can be for defamation in the charge of ſuch an offence.

And we had a prohibition.

The

Caſe 410.

The King *againſt* Ford.

An indictment ſtating the offence in the reign of *king Charles*, without ſaying *the firſt* or *the ſecond*, is bad.

INDICTMENT at the quarter-ſeſſions in the county of *Devon*, for an aſſault, and taking away a hand-gun. Being removed hither by *certiorari*,

I MOVED to quaſh it: becauſe,

FIRST, In the caption it was in the "thirty-ſixth of *king Charles*" and did not ſay *the firſt* or *the ſecond*, and ſo it might be before the offence: and being ſaid "*king Charles*," without any addition, it ſhould rather be intended king *Charles the firſt*, *ratione præcedentiæ*.

An indictment omitting "*preſent*" is bad.

Andr. 250.

SECONDLY, After the "*juratores ſuper ſacramentum ſuum præd.*" it wanted the word *præſentant*, and ſo was naught.

And upon that account it was quaſhed.

Caſe 411.

* [455]

* The King *againſt* Foot and others.

An indictment for breaking a park, and killing deer, the goods and chattels of A. concluding *cont. for. ſtat.* is good.

S. C. 1 Com. 69.

INDICTMENT for breaking and entering a park, and for hunting and killing fallow deer of the price of forty ſhillings of the goods and chattels of the aforeſaid *Richard Strode*.

I moved to quaſh it.

FIRST, Becauſe it concluded *contra formam ſtatuti* and therefore naught, becauſe there is no ſtatute againſt breaking the park, but only againſt chaſing, hunting, and killing, &c. (*a*)

SECONDLY, It was ſaid a deer "the goods and chattels of, &c." which could not be unleſs tame.

BUT without any anſwer to my exceptions THE COURT refuſed to quaſh it, and bid us to plead or demur.

(*a*) See 5 Geo. 1. c. 28. and 16 Geo. 3. c. 30.

Caſe 412.

The King *againſt* the Inhabitants of Limehouſe.

An indictment for a nonfeaſance "at A. aforeſaid in the county aforeſaid, is good" though it is not mentioned before.

An indictment good though the place where is miſnamed a

PRESENTMENT at a court-leet, for not repairing a certain *pair of ſtairs* leading to *the Thames*.

I moved to quaſh it.

FIRST, Becauſe it ſaid "*Radney Stairs*, in *Limehouſe* aforeſaid, in the county aforeſaid," and *Limehouſe* is never named before.

SECONDLY, The amerciament is of twenty pounds upon the inhabitants of the *hamlet* "aforeſaid," whereas there was no *hamlet* before mentioned;

mentioned; nor is *Limehouſe* any where ſo ſtyled in the whole preſentment, and it might be meant *White-Chapel*, where the court was held, as well as *Limehouſe*.

THE KING v. INHABITANTS OF LIMEHOUSE.

THIRDLY, The year of the king when the preſentment was is in figures.

Year of the king in *figures*.

FOURTHLY, It ſays that it was taken at the pariſh of *White-Chapel*, in the county, and alſo within the manor aforeſaid, and ſo does not ſay in what county, and perhaps *the manor* extends into two counties.

Indictment in the *county* and *manor* aforeſaid, good.

THE COURT however would not quaſh it, becauſe it was for not repairing the highway.

* The King *againſt* Salter.

Caſe 413. * [456]

INDICTMENT againſt the defendant at the ſeſſions for the county of *Devon*, for that he being an evil man, &c. and conſpiring to aggrieve one *Land*, pretended that he had broke his arm, and accordingly counterfeited the ſame, and upon that pretence refuſed to ſeek his living by any labour, and exhibited a complaint againſt him to the juſtices of the peace, &c. and IT WAS QUASHED upon my motion, as a matter not indictable.

Juſtices at ſeſſions cannot try an indictment for *a conſpiracy* under the commiſſion *of the peace*.

Porter *againſt* Culmore.

Caſe 414.

Eaſter Term, 36 *Car.* 2. *Roll* 353.

DEBT on a bond *in quinquigint. libris*, in which the condition was that if the plaintiff ſhould quietly and ſafely enjoy, &c.

A bond for quiet enjoyment in the penalty of *quinquigint. libris* is good.

The queſtion was, whether this were a good bond, the plaintiff having declared in debt for five hundred pounds.

Argued that it was well enough, according to the caſe of *Walter v. Piggot*, (*a*) where the bond was *ſeptuagint. et quinquagint. libris* and the demand was *ſeptingent. et quinquagint. libris*, and judgment for the plaintiff; for it was held no variance, though there was nothing pleaded by the party, or found by the jury, that it was meant for ſeven hundred pounds. So in *Fitzhughes's caſe* (*b*) though the bond was *octigint. libras*, inſtead of *octogint.* and held naught in the caſe of *Parker v. Kenedy* (*c*) a bond for *ſeſſanta libris* was held good for ſixty pounds; and in *Parry v. Dale* (*d*) *in quinquigint. libris*, was held good by moſt of the judges, upon a writ of error, though in the King's Bench, judgment was given for the defendant (*e*).

2 Lev. 166. 2 Roll. Abr. 146, 147. Nelſon's Lutw. 128.

THE LORD CHIEF JUSTICE. That which made me doubt was, becauſe the condition was *collateral*, for I always took a difference

(*a*) Hob. 116.
(*b*) Hob. 19.
(*c*) Hob. 19.
(*d*) Hob. 119. Yelv. 95.
(*e*) Cro Jac. 146.

between

CITY OF NORWICH v. JOHNSON.

tween a term in *reverſion* and in *poſſeſſion*, and then it being a term for years, the reverſioner knows not where to go but to the occupant; and though * he do recover the place waſted, yet that is no prejudice to the creditors, becauſe it is a *devaſtavit* in the defendant; and if there happen to be a rightful executor or adminiſtrator, he ſhall recover againſt the EXECUTOR *de ſon tort*, but he cannot get the land from the reverſioner again; beſides, he entering of his own wrong after the death of the leſſee makes himſelf chargeable, and he ſhall never be admitted to take any advantage of ſuch his own wrong, as otherwiſe it would be. As to the objection of its being *a diſſeiſin* by his entry, that is ſurely at the election of the lord or the reverſioner.

* [458]

See Atkins v. Horde, 1 Burr. 60. Cowper, 689.

IT WAS LIKEWISE OBJECTED, that his eſtate was tortious, and conſequently could have nothing but a fee gained by ſuch his entry; and conſequently could not be within the *ſtatute of Glouceſter*, that he could not gain any particular eſtate for life or years, but by ſome grant, or colour of ſome grant, but all tortious eſtates are fee-ſimple.

However, for the reaſons above, the JUDGMENT was affirmed.

Caſe 416. The King *againſt* Plowright.

A *certiorari* lies to remove an order of juſtices made under a ſtatute, although it enact that diſputes concerning taking a diſtreſs ſhall be *finally determined* by a juſtice of the peace.——Dougl. 555. 2 Term. Rep. 735.

THE ATTORNEY GENERAL moved for a *certiorari* to remove an order of juſtices concerning *hearth-money*; and it was granted accordingly.

If a ſtatute impoſe a duty on all *hearths*, exempting cottages *let* under a certain rent. *Quære* if the *landlord* is not liable to the duty. 5. C. 3 Mod. 94.

On the return of the order it appeared to be in diſcharge of the owner of a cottage under ten ſhillings yearly rent, to which no land was annexed, let to a poor woman, who by the act was diſcharged from the payment of it.

MR. ATTORNEY GENERAL moved to quaſh the order, becauſe by the words of the ſtatute 16 *Car.* 2. *c.* 3. (*a*) the *owner* ought to pay the duty, the words being, "and let the ſame," which "ſame" refers only to the leſſor, &c.

MR. POLLEXFEN *e contra*. I agree it has been reſolved in this court after much debate, that for houſes ſtanding empty the *owner* ſhould pay the duty, he being deemed an *occupier* within this law: but here the owner cannot be an occupier, for that there is another occupier who is expreſsly mentioned, and * undoubtedly diſcharged of payment by the exception of the ſtatute, and he ſhall not pay: now to make the occupier pay is to make the poor pay in conſequence, or otherwiſe it will make the owners proſtrate all the cottages, and ſo the poor will want places for habitation; this is ſtretching a little too far in aggrievance of the poor.

* [459]

WYTHENS *Juſtice*. Suppoſe a poor man not worth ten pounds in the world, has ſuch a cottage of the yearly value of five ſhillings and

(*a*) Repealed by 2 Will. and Mary, ſeſſ. 1. c. 10.

he

Hilary Term,

The Firſt and Second of James the Second,

IN

THE KING's BENCH.

Sir EDWARD HERBERT, *Knt. Chief Juſtice.*

Sir FRANCIS WYTHENS, *Knt.*
Sir RICHARD HOLLOWAY, *Knt.*
Sir ROBERT WRIGHT, *Knt.*
} *Juſtices.*

Sir ROBERT SAWYER, *Knt. Attorney General.*
HEANAGE FINCH, *Eſq. Solicitor General.*

The City of Norwich *againſt* Johnſon. Caſe 415.

Hilary Term, 35 & 36 *Car.* 2. *Roll* 63.

If a *leſſee* die inteſtate *during the term*, and a ſtranger enter and take poſſeſſion, he thereby becomes an EXECUTOR *de ſon tort*; and if he commit waſte on the demiſed premiſſes, he may be ſued as EXECUTOR *de ſon tort*, in an action of *waſte*.——S. C. Comb. 7. S. C. 3 Lev. 35. S. C. 3 Mod. 90. 2 Jones, 73. 1 Vent. 303. 2 Mod. 293. 1 Com. Dig. 266. 1 Stra. 235. 258. 3 Peer Wms. 341.

ERROR on a judgment in the Common Pleas, in *waſte* brought againſt the defendant there, as an EXECUTOR *de ſon tort*: and held that it lies, and judgment affirmed.

I did not hear the caſe ſtated (*a*), but the reaſons of the court of King's Bench in pronouncing the judgment were, becauſe there may be an EXECUTOR *de ſon tort* of a term, as is reſolved in the caſe of *Kenmick v. Burges*, (*b*) though a difference be taken be-

(*a*) The plaintiff had granted a leaſe for years of a farm to one *Cook*; and the defendant, after the death of *Cook*, and before the expiration of the term, entered on the premiſſes, and pulled down *a barn* thereon. S. C. 3 Mod. 91. The plaintiff declared againſt the defendant as executor to *Cook*. The defendant pleaded that *Cook* died inteſtate, and that adminiſtration was not granted to him, nor the term aſſigned to him by *Cook*, or by any adminiſtrator of *Cook*. The plaintiff replied, that the defendant, after the death of *Cook*, entered as *executor*, and did the waſte. The defendant demurred. It was argued for the defendant, that he could not be an EXECUTOR *de ſon tort* of *a term*; for no man can apportion his own wrong, but if he enter tortiouſly he is a *diſſeiſor*, and not a *termor*. But judgment was given for the plaintiff. S. C. 3 Lev. 35.

(*b*) Moor 126. caſe 273.

tween

LANCASHIRE v. GLOVER.

Demurrer thereto, becauſe we had not alledged what title he had, nor who had the title; and as in aſſigning a breach of covenant for quiet enjoyment by the entry of a ſtranger, you ought to ſhew by what title, and how, &c. ſo here.

But PER CURIAM held well enough: the very ſame being allowed on a writ of error in the caſe of *Salmon v. Bradſhaw* (*a*) upon ſolemn debate, and judgment affirmed; the breach being according to the covenant is well enough: and the caſe of *Hancock v. Field* (*b*) is ſtronger than this here. The defendant ought in his rejoinder to come and ſet forth what right he has, and then it is time enough for the plaintiff to deny that, or ſhew the right in another perſon: the like caſe *verbatim* is *Maſcot v. Ballet*, (*c*) and the caſe of *Burdet v. Proctor* in the King's Bench, is much ſtronger, by reaſon of thoſe uncertain words "*and other neceſſaries*;" and that caſe of *Salmon v. Bradſhaw*, has always been allowed and agreed ſound law.

See Plomer v. Plaiſted. Poſt, 460.

(*a*) Cro. Jac. 304. S. C. 9 Co. 60. and ſee the pleadings, Co. Ent. 116. 117.
(*b*) Cro. Jac. 170.
(*c*) Cro. Jac. 369.

Caſe 421. Hill *againſt* Harris.

Modus for Tithes.

PROHIBITION on a ſuggeſtion of *a modus* laid by way of cuſtom, for *a groat* to be paid for every hogſhead of cyder, or two ſhillings *per annum* in lieu of all tithes, of all grain and fruit in any ſuch orchard growing: and another cuſtom of the parſon's having the ſole milking and milk of all our milch kine, for ſo many weeks after *Midſummer*, and ſo many weeks after *Michaelmas*, in lieu of all tithes of milk: and we * ſuggeſted the ſtatute of improvement as to part.

* [461]

Prohibition to part.

Upon this ſuggeſtion I prayed *a prohibition* to a libel in the court chriſtian, for tithes *quoad hoc*; and upon debate it was granted.

MR. POLLEXFEN *ex adverſo*.

I ARGUED that a prohibition may be granted as to part, is every day's practice, and ſo is the caſe of *Luſh v. Webb* (*a*) in which there is another caſe cited to have been ſo adjudged the term precedent; and as to the laſt part nothing can be ſaid, but we muſt have a prohibition *quoad* the part: and nothing was ſaid againſt it.

And as to the firſt I argued, that it muſt be agreed, that if the ſoil of an orchard be ſown with any kind of grain, tithes ſhall be paid of the fruit-trees and the grain both; and ſo is 2 *Inſt.* 65. *a.* becauſe they are of ſeveral natures and kinds, but yet this *modus* is good. This is different from what is by law due of common right, and it is that which can never turn to a *non decimando*, but is as perdurable as the claim of tithes. It is certain enough; we fix it in a certain tenement; and this is as certain as any *modus* whatſoever that is in lieu

(*a*) 1 Sid. 254.

of

of any particular grain, becauſe that may be ſown ſometimes in one place, ſometimes in another; or that of the ſhoulder of a deer, or two ſhillings, in *Cowper's caſe*, (*b*) and agreed to be good if the park be continuing, though never a deer be killed in the year; or that of *Dr. Grant's*, of ſo much *per* pound for rent of houſes in *St Martin's Le Grand* (*c*) which may ſometimes be higher, and ſometimes lower. It is as certain as a common to be taken this year in one acre, and the next year in another acre, unto which another preſcription may be made; and ſo may a man have ſuch a moveable inheritance, as one of two manors changeably every year (*d*); ſo that the objection of the uncertainty here cannot have much weight: a *modus* may be for a garden or orchard, which ſhall ceaſe when converted into arable; and if a penny may be paid for the fruit and herbs, two-pence may be paid both for the fruit and grain, *Reynolds's caſe*. (*e*) By 13 *Rep.* 14. it appears that in all *modus's*, no reſpect is to be given to the value of what is yielded in ſatisfaction of tithes:* if a *modus* be for hay in *Black Acre*, and the party ſow the ſame with corn ſeven years together, that does not deſtroy the *modus*, but, whenſoever it ſhall be made into hay, the *modus* ſhall be in force. *Brown's caſe*. (*f*) So if a preſcription be for a *modus* of an orchard or garden, and it ceaſes to be ſuch, the *modus* ſhall ceaſe and the tithes be paid in kind; but if it afterwards be reſtored to an orchard or garden again, the *modus* ſhall be paid; this is agreed in the caſe of *Cooper v. Andrews*, (*g*) from whence it may be inferred, that if ſo the preſcription is good enough in any orchard, becauſe if it ceaſe, the tithe in kind is to be paid in any orchard, that is, ſo long as it continues ſuch: grain growing *in hujuſmodi pomario* is ſo long as it is *pomar*.

* [462]

We had a prohibition, and ordered to declare thereon, and upon it iſſue was taken.

(*b*) Hob. 40.
(*c*) Leyfield v. Tyſdall. Hob. 10. 10 Co 88.
(*d*) Co. Lit 4.
(*e*) Winch 2.
(*f*) Trinity Term, 10 Jac. 1. Godb. 194. and the ſame caſe is cited in 1 Roll, 121.
(*g*) 1 Roll. 121. S. C. Hob. 49.

Anlaby *againſt* Welborne.

Caſe 422.

TRESPASS for entering and breaking a cloſe called *Round-Garth*, &c. with a *tranſgr. præd. quoad conculcation. et conſumption. præd. pedibus ambulando et depaſturat. et conculcation. &c. cum averiis necnon proſtration. conculcat. et conſumption. acervorum hordei et piſar. præd. cum averiis præd.* from the aforeſaid *twenty-fifth* day of *March* to the *ſecond day* of *February* next following; *necnon* for entering and breaking the cloſe called *Round-Garth*, the twenty-ninth of September, the ſame year, and throwing down and deſtroying an heap of beans *cum averiis tranſgr. præd. quoad proſtrat. et conſumption. acervi illius, cum averiis continuando* from the aforeſaid *twenty-ninth* of *September* to the *ſecond* day of *February* following; *necnon* for breaking and entering two other cloſes called *Round-End* and *Little Cloſe ac herbam*

Treſpaſs for breaking and entering the plaintiff's cloſe, and treading down his beans, laid with a *continuando* from the 29th of *September* to the 2d of *February* following, is good.

Poſt, caſe 458. 2 Jones 194. Skin. 4.

ASLABY v. WELBORNE.

herbam ſuam et pratum, SCILICET, *decem acras prati ad valentiam 40s. in clauſis præd. tunc nuper creſcent. &c. et al' herb. ſuam et prat. &c.*

The exceptions I took were,

Continuando.

Vide 1 Sid. 318, 379. 3 Lev. 210. 1 Vent. 363. Yelv. 126. 6 Mod 38. 2 Jo. 194. 1 Sid. 224, 249.

FIRST, To the *continuando*: and as to that ſome books are, that a *continuando* may be of breaking a cloſe or a houſe. (*a*) But there are opinions that it cannot be, though a man go * every day; yet every ſuch entry is a new breach of the cloſe, and a *continuando* cannot couple ſeveral and diſtinct ſingle acts; and ſo is the year book (*b*) where for breaking a houſe it is ſaid, that it cannot be alledged with a *continuando*, no more than taking a horſe and detaining it ten days, and the taking cannot be continued; the like of cutting down ten trees; and yet it is agreed by all, that as to cattle a depaſture may be continued, becauſe of the common preſumption, that they may continue there for the time alledged. I confeſs ſome tranſient acts have been alledged with a *continuando*, and yet allowed good; as in the year book (*c*) a *continuando* in the taking away four loads of barley; and the caſe of *Litchford v. Elliot*, (*d*) treſpaſs for breaking a cloſe, and throwing ten logs there, laid with a *continuando*, and allowed good after verdict: and the caſe of *Butler v. Hodges*, (*e*) treſpaſs for entering and taking, and carrying away five hundred loads of barley; a *continuando* laid and held good: and the caſe of *Pane v. Browne*, (*f*) treſpaſs by a man and beaſt, with a *continuando* held good: the caſe of *Horrel v. Reynolds*, (*g*) in this court about the oyſters, a *continuando*, was held good; and the caſe of *Clayton v. Gillam*, (*h*) an Eſſex cauſe, on a motion in arreſt of judgment, by WYTHENS *Juſtice*, a *clauſum fregit*, and digging up ſtakes with a *continuando* held good. But notwithſtanding all theſe caſes, it ſeems unreaſonable that a treſpaſs ſhould be laid in treading down graſs by a meer *pedibus ambulando*, with a *continuando* for half a year together, becauſe the act of man is tranſient, and every man that lives is preſumed to eat, and drink, and ſleep, and to retire to ſome manſion houſe for ſo doing; and on the other hand, cattle are preſumed *levant and couchant* both day and night: and all thoſe caſes except that of *Butler v. Hodges*, are with a *continuando tranſgr. præd.* generally; and they are reſolved ſo on that very reaſon of this difference (which has been an allowed difference) between a *contin. tranſgr. præd.* generally, and * where the particulars are enumerated; for, in the former, after a verdict, the *continuando* ſhall be referred to that of which there may be a continuance. And TWISDEN *Juſtice* was of opinion againſt every one of thoſe judgments; and the reaſon of the caſe of *Butler v. Hodges* was becauſe the quality of the thing ſhews that it might be of long continuance; for five hundred loads of barley could not be carried away by one man in one day; but in our caſe it is quite otherwiſe, a treſpaſs

* [463]

* [464]

(*a*) As Fitz. N. B. 91. Bro. Abr. "Treſpaſs" 227. 1 Brownl. 223.
(*b*) 2 Rich. 3. pl. 15. and 20 Hen. 7. 2. 3. pl. 7.
(*c*) 21 Hen. 6. pl 43. abridged by Broke title "Treſpaſs" 249.
(*d*) 1 Sid. 224. S. C. Keb. 786. 894.
(*e*) 1 Sid. 319. S. C. 2 Keb. 173. 204. 215.
(*f*) 1 Sid. 379.
(*g*) Eaſter Term, 30 Car. 2.
(*h*) Eaſter Term, 34 Car. 2.

pedibus

pedibus ambulando may be all in one day to this value. Beſides, it is not preſumable that a man ſhould walk, &c. *pedibus ambulando continuando* for half a year, and conſequently it muſt be by new entries, which are diſtinct acts, and cannot be coupled: in treſpaſs a man may lay ſeveral *torts* and ſeveral treſpaſſes done at ſeveral times, and in ſeveral places, as *Buckmere's caſe* (*i*) and therefore it is not neceſſary to couple them with a *continuando*. In the caſe of *Hoſkins v. Jennings* (*k*) it is reſolved, that cutting and carrying away ten trees could not be with a *continuando*: I confeſs that in the caſe of the *Earl of Mancheſter v. Vale* (*l*) *tranſgr. pedibus ambulando*, is laid with a *continuando*, but no exception was taken to it, and therefore it is no authority againſt us. As to that of throwing down the ſtack of beans, that can never be good according to that difference which is moſt expreſsly agreed: ſo in 1 *Sid.* 319. that where the particulars enumerated in the *continuando*, will not admit of ſuch a continuance, it is error. (In *Raſtal's Entries*, 661. is a *continuando* of a *pedibus*, &c.) But ſuppoſing the *continuando* well enough, as the court there held it, yet here is an expreſs repugnancy; for the defendant is ſuppoſed, in the firſt count, to be on the land committing a treſpaſs *pedibus ambulando* for a year together; and yet in the ſecond count he makes a new entry *vi et armis* into the ſame cloſe in the interim, which cannot be, for he was there all the while: now here damages are given for both.

* Then as to the third count of *clauſum fregit et herbam ſuam et pratum viz. decem acras prati ad valenc'*, &c. *in clauſis præd. adtunc et ibidem creſcen. depaſtus fuit*, &c. This *edere pratum* is ſurely naught, for *pratum* cannot ſignify hay, or graſs ready to be mown, for that is expreſſed under the word *herbam*: the ſole and proper ſenſe of *pratum* is a meadow, and the ſoil is demandable by that name; and if a man ſhould grant thus "*herbam ſuam et pratum*, VIZ. "*decem acras prati in clauſo vocat.* LITTLE CLOSE *exiſten.*" the very land would undoubtedly paſs: an ejectment lies *de decem acris prati*, as is the *Book of Entries*, 243. and it is ſet before paſture and wood-ground: they have not helped it ſo much as by an ANGLICE. This is not after a verdict, for to the third count we have pleaded a ſpecial plea, and they have demurred: it is true, this is not *a præcipe* or an *ejectment*, where the thing demanded ought certainly and properly to be ſet forth, yet, in this action, they muſt expreſs a thing poſſible; and he might as well have ſaid *decem acras terræ*, and that would ſurely have been naught: it cannot be *ſurpluſage*, becauſe a value is ſet upon it. And if it do ſignify hay or any thing elſe beſides the ſoil, then he lays no property in it; he does not ſay *ſuum*, and therefore naught; the cloſe may be his, and the herbage another's. In the caſe of *Brook v. Brock*, (*m*) and *Whiteman v. Hawkins*, (*n*) treſpaſs *quare clauſum fregit et tres taſſas*, ANGLICE ſheafs, *tritici* did take, then and there being, was, after a verdict, held naught; becauſe not ſaid *ſuum*, as *quare*

A count in treſpaſs, that "*clauſum fregit*, "*et herbam ſuam* "*et pratum*, VIZ. "*decem acras pra-* "*ti*, of the value "of, &c. in the "cloſe aforeſaid "then and there "growing, &c." is bad.

* [465]

(*i*) 8 Co. 87.
(*k*) Trinity Term, 19 Car. 1. 2 Roll. Abr. 445.
(*l*) Mich. Term, 18 Car. 2. 1 Saund. 24.
(*m*) 1 Sid 184.
(*n*) 3 Bulſt. 303.

ANLABY v. WELBORNE.

fœnum ſaum cepit. So in *Purſel v. Bradley*, (*o*) treſpaſs for taking goods, *necnon equam, valoris, &c.* and does not ſay *ſuam.*

OBSERVE as to this of property, that it is eaſily anſwered, becauſe the cloſe is alledged to be his, and then the graſs growing there ſhall be intended his likewiſe: and the caſes I have mentioned are of things either ſeveral or ſevered from the ſoil.

But on that of *edere pratum* we had judgment for the defendant.

NOTE, As to the objection of the repugnancy it was over-ruled, being after a verdict: *quære ration.*

(*o*) Yelv. 36.

Caſe 423.

* [466]

* Luxon *againſt* Corbin.

Hilary Term, 35 & 36 *Car.* 2. *Roll* 1073.

AND

Hilary Term, 1 & 2 *Jac.* 2. *Roll* 818.

A venire facias out of an inferior court muſt be returnable on a day certain.

ERROR to reverſe a judgment given in the borough-court of *Taviſtock*, in *Devon*, in an action on the caſe on ſeveral promiſes:

The errors I inſiſted on were,

FIRST, That the *venire facias* is returnable at an uncertain time, as at a court to be adjourned, &c; and a *venire* returnable at the ſame court it is awarded, is naught: (*a*) a court cannot be adjourned till it comes.

In an action in an inferior court, if the *venue* be laid at A. within the juriſdiction, *Qu.* if a *venire de vicineto burgi de A.* be good.

SECONDLY, The *venue* is laid at *Taviſtock* within the juriſdiction, &c. and the *venire* is awarded *de vicineto burgi de Taviſtock.* I agree the caſes of *Plymouth* and *Lyme*, where the *venire* was *de vicinet. de Lyme, et de viſn. de Plymouth*, for there you might well intend them the ſame; but here the vicinage of the borough may be out of the juriſdiction; the *borough of Taviſtock* can not be intended to be the ſame with *Taviſtock*; for that rather ſeems to be ſome place within the borough: in the caſe of *Lyme* and *Plymouth*, they are ſaid to be ancient boroughs and *ſecundum conſuetudinem*; here is no ſuch thing appears; this is a new court. The ſtatute of jeofails of the late king (*b*) reaches not to inferior courts; the ſtatute of king James (*c*) is only where more or fewer places are named, provided there be one right one (*d*).

(*a*) Morgan v. Boddington, 1 Roll. Abr. 789.

(*b*) 16 and 17 Car. 2. c. 8.

(*c*) 21 Jac. 1. c. 13.

(*d*) But ſee the ſtatutes 4 and 5 Ann. c. 16; and the 3 Geo. 2. c. 25.

THIRDLY,

THIRDLY, The declaration is an *indebitatus* for money lent, and it does not ſay where the money was lent, it has not *ibidem*. This has always been allowed as error; and ſo was the caſe of *Cudmore v. Tripe* (*e*) in this court, and in the caſe of *Ramſey v. Atkinſon* (*f*).

An *aſſumpſit* in an inferior court, for money lent, muſt ſhew the place where it was lent.

And for this fault judgment was reverſed.

Ante, caſe 246, 381

2 Sid. 65. Raym. 75. 1 Lev. 50, 69, 96, 105, 137, 156. 2 Lev. 87. 1 Saund. 74. 1 Mod. 32. and ſee 2 Mod. 274. and Trevor v. Wall. 1 Term. Rep. 151.

(*e*) Ante 413. 5 Mod. 78. Comb. 347. (*f*) 1 Sid. 65.

Memorandum.

IN this vacation was *Sir Edward Nevil* removed from being Puiſne Baron of the Exchequer, and *Sir Thomas Jenner*, recorder of *London*, placed in his room; and *Sir John Holt*, made recorder in his room by letters patent; and under him was 1 deputy recorder, and kept the ſeſſions often.

Sir J. Holt made recorder of *London*.

Eaſter Term,

The Second of James the Second.

IN

THE KING's BENCH.

Sir EDWARD HERBERT, *Knt. Chief Juſtice.*

Sir FRANCIS WYTHENS, *Knt.*
Sir RICHARD HOLLOWAY, *Knt.* } *Juſtices.*
Sir ROBERT WRIGHT, *Knt.*

Sir ROBERT SAWYER, *Knt. Attorney General.*

HEANAGE FINCH, *Eſq. Solicitor General.*

Fowke *againſt* Hunt.

Caſe 424.

IN Chancery it was held and declared by LORD JEFFERIES, that if a freeman of *London* die, leaving a wife and grand-children, the *grand-children*, in ſuch caſe, ſhall not have the benefit of *the cuſtom* of an orphanage part, but the wife ſhall have a moiety, as if no child at all; and this upon the report of THE RECORDER (*a*).

Grand children, are not entitled to an *orphanage part* under the cuſtom of London.

S. C. 1 Vern. 397.

1 Salk. 426. 1 Atk. 399. 4 Com. Dig. "Gardian" (G. 2.)

(*a*) The cuſtom is, that if a freeman die, the ſurplus of his perſonal eſtate, after his debts and funeral be paid, ſhall be diſtributed, one third to his wife; another third to his children; and the other third part he may diſpoſe of by will. If he has no children, one moiety to his wife; and if no wife, one moiety to his children, and the other moiety at his own diſpoſal. 2 Vern. 665. 1 Salk. 426. 1 Atk. 399. 2 Stra. 947. 2 Ld. Ray. 1328 Butnow by 11 Geo. 1. c. 18. ſ. 17 "every freeman of "*London* may give, deviſe, will, and diſ- "poſe of his perſonal eſtate to ſuch per- "ſons, and to ſuch uſes, a he ſhall think "fit. But he may agree by writing under "his hand that his perſonal eſtate ſhall be "ſubject to the cuſtom; and if he die in- "teſtate, the perſonal eſtate of ſuch free- "man ſo making ſuch agreement, or ſo "dying inteſtate, ſhall be diſtributed ac- "cording to the cuſtom."

Caſe 425.

Birth *againſt* Maypowder.

An attachment or contempt is not abated by the demiſe of the king. S. C. 1 Vern. 400.

ON a ſpecial report coming to be heard before my LORD CHANCELLOR, it was held by him, that an *attachment* iſſuing in the late king's time (for not anſwering) and executed in this king's time was regular, being as *a civil proceſs* for not anſwering.

Tamen quære, for I, being of counſel for the defendant, was doubtful thereof, it being *a proceſs of contempt.* (*a*)

(*a*) It was admitted, that the ſervice of the attachment being made only three days after, and *before notice* of, the king's demiſe, was good. S. C. 1 Vern. 400. and the objection was, that the return of the *cepi corpus* and the proceedings for the contempt, being *after notice* of the demiſe, was bad. But the court, upon the authority of *Crew v. Bampton*, *Cro. Car.* 97. and *Vaughan v. Bampfield*, held the ſervice of the attachment, the return of the *cepi corpus*, and the proceeding for the contempt, good. 1 Vern. 400. See Moor 333. 1 Hale, P. C. 499. 2 Hale, P. C. 24. Cowper, 136. 1 Term. Rep. 265.

Caſe 426.
* [468]

* The King *againſt* Eades.

Information for commending a ſeditious book. Vide 5 Mod.

DR. EADES the defendant, was tried at the bar on an information for commending a book, in which were ſeveral ſeditious ſentences and clauſes, &c. and convicted:

It was moved in arreſt of judgment, that here was not a ſufficient charge upon him, for that it was not averred that he either read, or knew theſe ſentences to be therein, and *Vaux's caſe*, (*a*) and the caſe of *Sir John Aſhley*, (*b*) were cited.

If, on an information filed by the *Attorney General*, a day be given to the *maſter of the crown office*, it is bad.

ANOTHER EXCEPTION was taken, that amongſt the *continuances* there was a *dies datus* to SIR SAMUEL ASTREY, *clerk of the crown*; whereas the information was in MR. ATTORNEY'S name, and he had joined iſſue; and therefore *prædicto* SAMUELI ASTREY could not be good, he not being named before.

It was anſwered, that the king was always preſent, and any one might proſecute for the king.

But afterwards in another term, all exceptions were waived, and upon the defendant's ſubmiſſion he was fined a hundred pounds.

(*a*) 4 Co. 44. (*b*) 3 Cro. 1 Sid. 240.

The

The King *againſt* Ivyes.

Caſe 427.

INDICTMENT for keeping an alehouſe without licence, *contra formam ſtatuti*, removed hither by *certiorari*.

MR. POLLEXFEN moved to quaſh it, as an offence not indictable the ſtatute of 5 & 6 *Edw.* 6. *c.* 25. giving the juſtices power to commit, on non-payment of, &c. At common law no licence was neceſſary.

And ſo held by all the judges (*a*).

Vide Hutt. 100. 11 *Rep.* 64, 59. 7 *Rep.* 37. *Caſtle's caſe.* 2 *Cro.* 648. *Rex v. Baker, Mich.* 24 *Car.* 2. Information for Waggons. *Plowd.* 206. and quaſhed.

An indictment will not lie on 5 & 6 Edw. 6. c. 25. for keeping an alehouſe without licence.

S. C. Trem. 135. 1 Ld. Ray 347. 1 Burr. Rep. 544. 6 Mod. 86. 2 Burr. 799.

(*a*) See the caſe of Rex v. Marriot. 1 Show. 400. and note (*b*) 1 Show. 402. See alſo, S. C. 4 Mod. 145, 8vo. edit.

* Radney *againſt* Strode and others.

Caſe 428.

Eaſter Term, 1 *Jac.* 2. *Roll* 209.

* [469]

ACTION on the caſe againſt the defendants and others, for maliciouſly charging him with high treaſon, and proſecuting him for the ſame, &c. On *not guilty* pleaded, the jury find them *guilty*, and aſſeſs damages as to one of the defendants fifty pounds, and as to the other defendant *Strode*, they aſſeſs damages to a thouſand pounds; the plaintiff enters a *nolle proſequi* as to the fifty pounds.

In an action on the caſe againſt *two* defendants *jointly*, for a malicious proſecution, if the jury find both of them guilty, and give 1000l. damages againſt one, and 50l. damages againſt the other; the plaintiff may enter a *nolle proſequi* againſt the defendant as to the *fifty pounds*, and take judgment againſt the other for the thouſand pounds.

And for the defendant *Strode*, IT WAS MOVED *in arreſt of judgment*, that the jury cannot thus ſever damages, for it is laid to be a joint treſpaſs, and the jury have found them guilty *modo et forma* as alledged but ſever the damages, which they cannot thus do; and therefore the verdict is repugnant and inconſiſtent; for they find that he ſuſtained but fifty pounds damages, by reaſon of the treſpaſs, and conſequently could not ſuſtain a thouſand pounds.

And SIR JOHN HOLT inſiſted, that a *nolle proſequi* could not help it, for there is no caſe where a *non proſ.* can be entered where the pleas are joint, but it is rather a diſcharge to both. In the caſe of *Parker v. Sir John Lawrence* (*a*) it was held that *non proſ.* as to one, releaſes all, if before judgment; and *Sir John Heyden's caſe*, (*b*) is expreſs, that where they plead *not guilty* and the jury find them *guilty* at one time, as the plaintiff ſuppoſes, the jury cannot ſever the damages; and where one comes in and pleads, and is found guilty, he ſhall be charged with the firſt damages.

Vide ante, caſe 122, 139 245, 292. S. C. 3. Mod. 101. S. C. Carth. 19. S. C. Comb. 18. 39. Cro. Jac. 118. Abr. 9. 10.

Cro. Car. 239. 2 Str. 910. 2 Ld. Ray. 1381. 2 Bac.

(*a*) Hob. 70. (*b*) 11 Co. 5.

Alſo

RADNEY v. STRODE.

Alſo THE COUNSEL *for the defendant* further urged the caſe of *Auſtin v. Wikward* (*c*). Battery againſt two, and ſeveral damages; and held naught though on ſeveral iſſues, becauſe the treſpaſs is joint, unleſs one had been found guilty in part, and the other of the whole: and the caſe of *Putt v. Royſton* (*d*) in this court was cited: and the caſe of *Green v. Charnock* and others (*e*), treſpaſs againſt two; and held the *nolle proſequi* was a releaſe to both: and the caſe of *Coke's Entry* (*f*): and they urged the caſe of *Player v. Warne* (*g*), where it was held that, on a *general* * *guilty* found, ſeveral damages were naught, otherwiſe where they were found *ſeverally guilty*, one as to part, and another as to another part (*b*). They all inſiſted, that when they pleaded jointly, and a general verdict finds them guilty generally, that there damages could not be ſevered.

* [470]

MR. POLLEXFEN *è contra*. That the *nolle proſequi* is no releaſe, it is but a declaration not to ſue; and cited the caſe of *Sampſon v. Cranfield* (*i*). Battery againſt two, and verdict for the plaintiff, and damages aſſeſſed ſeverally, ſo much againſt one, and ſo much againſt another, and held good; a caſe the ſame with ours. Every treſpaſs is both joint and ſeveral, and *not guilty* is the ſeveral plea of them all, for one may be found guilty, and the other not, and therefore there is no difference where the plea is joint and where it is ſeveral: *Heydon's caſe* is expreſs, that there is no difference where the pleas are joint and where ſeveral: therefore the damages here taxed generally are well enough. In *Raſtal* (*k*), battery againſt four, one jury aſſeſs ſeveral damages. In the caſe of *Welſh v. Biſhop* (*l*), battery againſt two; one pleads *not guilty*, the other pleads *ſon aſſault*, and one jury try both the iſſues, and aſſeſs ſeveral damages, and a judgment againſt one only, and well. In the caſe of *Trebarfoot v. Greenway* (*m*) in this court, falſe impriſonment, the one demurs, the other pleads, and ſeveral damages, and a *nolle proſequi* againſt one, and judgment againſt the other (*n*).

In Michaelmas term following, after ſeveral debates,

WYTHENS, HOLLOWAY, and WRIGHT, *Juſtices*, gave rule for judgment for the plaintiff; LORD *Chief Juſtice* abſent; then he coming the next day and doubting, it was adjourned to Trinity term: and afterwards judgment was given for the plaintiff (*o*).

(*c*) Cro. Eliz. 860.
(*d*) Ante, 211.
(*e*) Cro. Eliz. 762.
(*f*) Co. Ent. 650 676.
(*g*) Cro. Car. 54.
(*b*) Year Book, 11 Hen. 7. pl. 27. and Stiles, 124. 128.
(*i*) 1 Bulſt. 157.
(*k*) Raſtal's Ent. 677.
(*l*) Cro. Car. 239. 243. 2 Roll Abr. 100.
(*m*) 3 Mod. 102.
(*n*) 1 Roll Abr. 784, 785.
(*o*) This judgment was afterwards affirmed on writs of error. S. C. Carth. 21.—But ſee on this ſubject Hill v. Goodchild, 5 Burr. 279:. Noke v. Ingram, 1 Wilſ. 89. Weller v. Goyton, 1 Burr. 358. Rex v. Clarke, Cowp. 611. Powel v. White, Dougl. 169. Roſe v. Bowler, 1 H. Bl. Rep. 108. Drummond v. Dennat, 4 Term Rep. 360.

The

* The King *againſt* Williams.

Caſe 429.
* [471]

Proceedings on an information againſt *Williams*, Speaker of the Houſe of Commons, for publiſhing "*Dangerfield's Narrative.*"
S. C. Comb. 18.
See Poſt, 505.

INFORMATION for publiſhing an infamous libel, called "*Dangerfield's Narrative.*"

The defendant pleads, that by the law and cuſtoms of *England*, the Speakers of the Houſe of Commons have ſigned and publiſhed the acts of the Houſe, &c.

MR. ATTORNEY GENERAL demurs.

MR. JONES was beginning to argue, and took ſome exceptions, as that he does not aver the libel in the information and that in the plea to be the ſame.

LORD CHIEF JUSTICE. We will not, in ſuch a caſe, debate the formality of ſuch an idle inſignificant plea: let us hear what they have to ſay for it.

MR. POLLEXFEN began, "The court of parliament, &c."

LORD CHIEF JUSTICE. Court do you call it? Can the order of the Houſe of Commons juſtify the ſcandalous, infamous, flagitious libel?

MR. POLLEXFEN then ſaid, "I have no more to ſay, &c."

LORD CHIEF JUSTICE. Let judgment be entered for the King.

And afterwards *Mr. Williams* was fined ten thouſand pounds, and upon payment of eight thouſand of it, ſatisfaction was acknowledged upon record.

Memorandum.

Promotions of *Powys*, *Atkins*, *Heath*, and *Milton*.

IN this term MR. FINCH was moved, and MR. POWYS knighted, and made the King's Solicitor General. LORD MOUNTAGUE was removed, and SIR EDWARD ATKINS made Chief Baron. Alſo HEATH and MILTON were made Barons.

Memorandum.

Bedingfield and *Lutwyche* promoted, and *Jones* and *Levinz* removed.

IN the Common Pleas LORD JONES was removed, and SIR EDWARD BEDINGFIELD made Lord Chief Juſtice in his room, and LEVINZ removed, and SIR EDWARD LUTWYCHE placed in his room.

Memorandum.

Memorandum.

Charleton promoted.

ALSO SIR JOB CHARLETON was made Chief Juſtice of *Cheſter*, and had a patent given him for precedency as he was a judge, and to wear a judge's robe at *Cheſter*, and POWEL placed in his room. And SIR CRESWELL LEVINZ came to the bar again, as alſo MR. FINCH, &c.

Caſe 430.

* [472]

* The King *againſt* Neck.

On an indictment for forging a bond, "by "which A. *bound* "himſelf to "pay," it ſhall be intended "*purporting* that A. "bound himſelf to pay." S. C. 3 Mod. 104.

INDICTMENT for forgery, after the verdict I MOVED in arreſt of judgment.

FIRST, It was ſaid, that he forged a bond *per quod J. S. obligaſſet ſeipſum in, &c. ad ſolvend', &c.* which was repugnant, becauſe if he did oblige himſelf, it could not be forged; and if it were forged, he could not be obliged; *ſed non allocatur*, becauſe that was only to be intended, *purporting* that he had obliged himſelf (*a*).

An indictment for forging *a writing*, containing "a certain writing "obligatory," is bad. S. C. 3 Mod. 104.

SECONDLY, It was, he did forge *quoddam ſcript. continen. ſcript. obligat. per quod, &c.* Now here is no expreſs allegation that he did forge the obligation, but the obligation might be recited in it, or contained in a letter which he counterfeited.

THE COURT. It is a wheel in a wheel, and can never be made good. See the caſe of *Rex v. Ring*, 1 *Keb.* 803. 849.

Judgment was ſtayed.

(*a*) But ſee 2 Hawk. P. C. ch. 25. ſ. 62.

Caſe 431.

Plomer *againſt* Plaiſted.

In covenant on an indenture of apprenticeſhip, for not finding him "meat, "drink, waſh-"ing, and *other* "*neceſſaries*," a breach aſſigned in the words of the covenant, without ſtating what theſe *neceſſaries* were, is good.

COVENANT brought on an apprentice's indenture, for not teaching him his trade, and not finding him in meat, drink, waſhing, lodging, and *other neceſſaries*.

Demurrer to the declaration, and ſhews for cauſe according to the ſtatute, that *other neceſſaries* is uncertain, and that the plaintiff had not ſet forth what thoſe neceſſaries were for an apprentice, according to the cuſtom of the city of *London*.

MR. HALL urged that it was naught; and they had ſhewn it for cauſe of demurrer, which was not done in any of the caſes adjudged.

Ante, 442. Cro. Jac. 486. 2 Saund. 411.

I ANSWERED, That that made no difference, and that here "*other* See 227. 3 Wilſ. 530. Dougl. 214. Cowp. 665. 727.

"*neceſſaries*"

"*neceſſaries*" is well enough, it being a breach aſſigned according to the expreſs words of the covenant, and the covenant being general, the breach is well enough alledged in the generality; and ſo are abundance of caſes, and ſo it was ſettled here upon debate * the laſt term, in the caſe of *Burdet v. Proctor* (*a*), which was a writ of error upon a judgment in the Common Pleas, and both in that court; and in this reſolved well enough, though the caſe of *Mills v. Aſtel* (*b*), was urged to the contrary; and your lordſhip's then opinion was, that to ſet forth all the neceſſaries, and to particularize them, would be infinite, and a jury can beſt determine of neceſſaries; and the judgment was affirmed, and upon that very authority I drew this declaration. Beſides, the books are full of the like caſes, that where the covenant is general, the breach aſſigned may be ſo too (*c*): I confeſs the caſe of *Mills v. Aſtel* (*d*) is againſt me, but againſt that caſe are a great many authorities: as *Salmon v. Bradſhaw* (*e*), covenant, that he had lawful right and eſtate to let, &c.; breach aſſigned, that he had not lawful right and eſtate to let, &c. *et ſic infregit conventionem*, &c.; and the Court held it good, for the covenant being general, the general breach was good; and it was affirmed on a writ of error. A ſtronger caſe than that is *Hancock v. Field* (*f*), where was a covenant for reparations during the term, and to leave the ſame well repaired at the end of the term; and breach aſſigned in not leaving the houſe well repaired at the end of the term, and ſhews not in what point it was not well repaired, ſo as the defendant might give a particular anſwer thereto; for that in declaration in covenant it is ſufficient to aſſign the breach as general as the covenant, and there was no verdict in that caſe, but it was on a demurrer. So in *Symmes v. Smith* (*g*), covenant to permit the plaintiff to enjoy the lands, and to take the rents, iſſues, and profits; breach, that ſhe did not ſuffer him to enjoy the ſaid lands, but had received the rents, iſſues, and profits of them herſelf, from the making of the indenture; upon demurrer to the declaration, and ſhewing for cauſe, that the plaintiff did not ſet forth what rents, iſſues, and profits, it was held well enough, becauſe the breach may be aſſigned as general as the * covenant is. The caſe in *Cro. Car.* 299. is not the ſame, but another caſe, for there judgment was ſtayed. So the caſe of *Cryps v. Sir Henry Baynton* (*h*). *Aſſumpſit*, that J. S. being a friend of the defendant's, and coming to the plaintiff's houſe, fell ſick, the defendant, in conſideration that the plaintiff would provide for him ſuch neceſſaries as he ſhould want, he would *bene et fidelit. ſolvere proinde*; the plaintiff ſhews that he lay there two months, and that he provided him neceſſaries, amounting to, &c; and held good without ſhewing what neceſſaries, to avoid multiplicity of reckonings: ſo a phyſician in *aſſumpſit* for a cure, need not ſet forth all his neceſſaries. (*i*)

* [473]

* [474]

(*a*) Ante, 442.
(*b*) Cro. Jac. 486.
(*c*)
(*d*) Cro. Jac. 486.
(*e*) 9 Co. 60. Cro. Jac. 304.
(*f*) Cro. Jac. 170. 2 Rol. Rep. 407.
(*g*) Cro. Car. 175. Jones, 218.
(*h*) 3 Bulſt. 31.
(*i*) A phyſician cannot maintain an action for his *fees*. Chorley v. Bolcot, 4 Term. Rep. 317.

Whereupon

PLOMER v. PLAISTED. Whereupon by THE WHOLE COURT we had judgment for the plaintiff.

"*Per quod teſtatum exiſtit*," is good. There was ANOTHER EXCEPTION not moved, as the *per quod teſtat. exiſtit*, but that has been held good enough. *Stevenſon v. Stevenſon*, *Sid.* 375, 376.

Trinity

* Trinity Term,

The Second of James the Second,

IN

THE KING's BENCH.

Sir EDWARD HERBERT, *Knt. Chief Juſtice.*

Sir FRANCIS WYTHENS, *Knt.*
Sir RICHARD HOLLOWAY, *Knt.* } *Juſtices.*
Sir ROBERT WRIGHT, *Knt.*

Sir ROBERT SAWYER, *Knt. Attorney General.*

Sir THOMAS POWIS, *Knt. Solicitor General.*

Godden *againſt* Hales.

Caſe 432.

Eaſter Term, 2 *Jac.* 2. *Roll* 180.

BULSTRODE *Attorney* for the Plaintiff.

DEBT for five hundred pounds upon the ſtatute of 25 *Car.* 2. *c.* 2. for accepting and exerciſing the office of *coloncl*, &c. not having taken the oaths, and ſubſcribed the declaration; and ſet forth an indictment and conviction for the ſame, *per quod actio accrevit.*

The defendant pleads in bar, that after his admiſſion, and before three months expired, the king, by his letters patents, had pardoned, releaſed, and *diſpenſed* with the ſaid oaths, &c.

The plaintiff demurs.

The king of England might formerly *diſpenſe* with any law, and therefore on a conviction on the 25 Car. 2. c. 2. for holding the office of *colonel*, without having taken *the oaths*, if the king granted the conviction a *diſpenſation*, he might plead it *in bar* to an action by the informer for the penalty. ——— S. C. Comb. 22. Ante, caſe 52.

MR.

GODDEN v. HALES.

MR. NORTHEY *for the plaintiff* argued, that this diſpenſation ought to have been pleaded to the indictment; that now it came too late; that by the conviction the action accrued to the informer; that if a man will not plead a pardon, no advantage can be taken of it afterwards; that now, by this plea, the indictment and conviction are admitted. He cited *Bro. tit.* "*Charter de pardon*," 15. He that pleads a pardon muſt plead it before he pleads *not guilty*; here he had a day to plead it, *Marſhal's caſe*, 3 *Cro.* 4. 1 *Roll Abr.* 306.

THE LORD CHIEF JUSTICE. Come to the point and argue that.

MR. NORTHEY. Then the diſpenſation is merely void. In the year book 4 *Hen.* 7. 11, 12. it is ſhewn in what caſes the king * may diſpenſe, as with a *malum prohibitum* by ſtatute, but not where others are prejudiced by ſuch diſpenſation; as if a man be bound in a recognizance to keep the peace, the king cannot releaſe that duty, becauſe of the prejudice that may thereby accrue to others; and yet when it is forfeited he may. The king cannot diſpenſe with an act of parliament that is of public concern, becauſe of the intereſt which every ſubject hath therein. 4 *Inſt.* 135. Wherever an act of parliament inflicts a diſability, the king cannot diſpenſe therewith, as the 31 *Eliz. c.* 6. concerning *ſimony*; neither the king's pardon after, nor his diſpenſation before, can take away the diſability (*a*). So as to the 5 & 6 *Edw. c.* 6. concerning ſale of offices (*b*). The king cannot controul an act of parliament that diſables a man (*c*). If the king ſhould licence a man to ſell an office, ſuch licence would be void (*d*). This act impoſes a condition on his capacity to hold; nay, upon his taking the office there is an incapacity attached, which could not be remedied but by taking the oaths; he is diſabled to enjoy, he is only to hold but three months, unleſs he take the oaths: it is agreed, that the king cannot diſpenſe with the ſtatute of 7 *Jac.* 1. *c.* 6. This prerogative was never made uſe of ſince the ſtatute was made, though at the time of making of it, many perſons of worth loſt their places, by reaſon whereof the late king loſt their good ſervices. As to the caſe of 2 *Hen.* 7. 6, 7. concerning the office of ſheriffs, with a *non obſtante*, there never was any judgment in it; and the juſtices, and ſerjeants, and attorney agreed to ſtudy it well, and ſaid, what they had there ſaid ſhould be reckoned for nothing, and declared they would not be bound by it: it is the ſingle opinion therefore of COKE; and in *Brooke* (*e*) it is ſaid, that the matter was left at large and not adjudged. But admitting that caſe, yet it differs from this; the ſtatute there was purely reſtrictive of the king as to his power of commanding, that the king ſhould not grant; ſo that the king may command notwithſtanding: * but this ſtatute is only directive to the ſubject how to qualify himſelf: he cited *Sir John Reed's caſe*, ſheriff of *Hertfordſhire* (*f*). And he farther urged, that in that caſe

* [476]

* [477]

(*a*) Co. Lit. 220. 3 Inſt. 104. 124. Cro. Jac 385. Hob. 75. Moor, caſe 1:99.
(*b*) Co. Lit. 234.
(*c*) Cro. Jac. 386. 3 Inſt. 125.
(*d*) See the caſe of Thomas v. Sorrel, Vaugh. 354.
(*e*) Bro. Abr. title "Patent," 45. 109.
(*f*) Hilary term, 27 & 28 Car. 2.

of

of the ſheriff the diſpenſation is in the patent that grants the office; ſo that it is before the incapacity is attached; but here it comes afterwards, and too late. GOLDEN v. HARES.

SIR THOMAS POWYS *contra*. No man was by the common law incapacitated, but he had ſome way or other to remove that diſability. He urged that the king's prerogative was, and is as much the law of *England*, as any ſtatute (*g*).

GLANVIL *Serjeant*. This power of diſpenſation is not a notion of this age. The difference of *malum in ſe*, and *malum prohibitum* has always been allowed. A law made *pro bono publico* is not to be diſpenſed with; but where an act of parliament prohibits a thing, that was lawful before, under a penalty, which is not to the damage of particular perſons, the king may diſpenſe with it: what is *pro bono populi complicati* the king is judge of, and may diſpenſe with; otherwiſe of what is *pro bono ſingulorum populi*. (*b*) The ſtatutes of mortmain have been diſpenſed with (*i*): this here is not a *malum in ſe*; it was lawful before; this is not to the damage of particular perſons, but it is of public concern in the general; and in ſuch caſes there is a neceſſity for this power of diſpenſing. There is a great diſtinction between the laws of property and thoſe of government; this is a law of government, which was made not to reſtrain the king's power, but to guard the government againſt danger; and when the king is ſenſible there is no danger, the reaſon of the law ceaſes: murder may be pardoned with *a non obſtante* (*k*). Theſe are incidents inſeparable from the crown (*l*). No diſability can deprive the king of the ſervice he may command: he cited *Sir Walter Raleigh's caſe* (*m*), and *Calvin's caſe* (*n*) confirms that opinion of 2 *Hen.* 7. 6.

* The LORD CHIEF JUSTICE took time to conſider of it, and ſpake with the other judges, and three or four days after, declared that he and all the judges (except STREET and POWELL, *Juſtices*, who doubted) were of opinion, that the kings of *England* were abſolute ſovereigns; that the laws were the king's laws; that the king had a power to diſpenſe with any of the laws of government as he ſaw neceſſity for it; that he was ſole judge of that neceſſity; that no act of parliament could take away that power; that this was ſuch a law; that the caſe of ſheriffs in the ſecond year of *Henry the Seventh*, was law, and always taken as law; and that it was a much ſtronger caſe than this. * [478] NOTA.

And therefore gave judgment for the defendant (*o*).

Common

(*g*) 7 Co. 36. Vaugh. 347. Year Book, 1 Hen. 5. 2 Roll. Abr. "Prerogative." 1 Ruſh. Coll. 572.
(*h*) Dyer, 53. Vaugh. 353.
(*i*) Fitz. N. B. 22. "Ad quod damnum."
(*k*) Vaugh. 336.
(*l*) Fitz. Cor 139.
(*m*) Cro. Jac. and 3 Inſt. 136. 12 Co. 19. Plowd. 492. 522. 592.
(*n*) 7 Co. 1. Jenk. 306.
(*o*) By 2 Edw. 3. c. 8. and 12 Rich. 2. c. 10. it is enacted, that no commands or letters ſhall be ſent under the great ſeal or the little ſeal, the ſignet or privy ſeal in diſturbance of the law, or to diſturb o

Caſe 433. Salmon *againſt* Bullock.

A declaration for *breaking* the plaintiff's houſe, and *beating* his ſervant, is good.

TRESPASS, for that the defendant, ſuch a day, *domum ſuam fregit et intravit*, and, then and there, beat his ſervant *per quod ſervitium amiſit*: HELD well enough upon debate, though thus joined.

Caſe 434. Boſon *againſt* Sandford, and others.

The proprietors of a ſhip commonly employed in carrying goods on freight are liable as *common carriers* for the loſs of goods ſhipped; but the action muſt be brought againſt all the part owners, or the defendants may plead it in abatement.

S. C. 1 Show. 29. 101.
S. C. 3 Mod. 321.
S. C. 1 Salk. 440.
S. C. 3 Salk. 203. 258.
S. C. Comb. 116.
S. C. Carth. 58.
S. C. Skin. 278.
S. C. 1 Freem. 499.
2 Stra. 128.
1 Wilſ. 281.
4 Burr. 2298.
2 Bl. Rep. 948.
Cowp. 636.
2 Term Rep 282.
Term Rep 581.

CASE, wherein the plaintiff had declared, that whereas on the tenth of *May*, 1685, the plaintiff had at *London* delivered and laden on board the ſhip, called "THE COMPANY'S ADVENTURE," of EXON, whereof the defendants were then and there owners (in which ſaid ſhip the goods and wares of perſons requiring the carriage thereof, were commonly carried and tranſported for reaſonable freight and ſalary) divers goods and wares of the ſaid plaintiff, *viz.* &c. to the value of a hundred pounds, in good order and well conditioned, to be ſafely tranſported for the plaintiff from *London* aforeſaid, to the port of *Topiſham* in the county of *Devon*, in the ſaid ſhip (the danger of the ſeas excepted) for a reaſonable freight and ſalary by the plaintiff to the defendants, for ſuch carriage thereof, to be paid; and the ſaid defendants the ſame goods and wares of the plaintiff's in the * ſaid ſhip under their cuſtody, for the cauſe aforeſaid, then and there had and received, and them to tranſport and carry in form aforeſaid, did undertake: nevertheleſs the defendants not regarding their duty in this behalf, but fraudulently intending to injure the ſaid plaintiff, and not hindered by the dangers of the ſeas, but the ſaid ſhip arrived ſafe in the port of *Topiſham* aforeſaid, the ſaid goods and wares, in ſuch good order and condition as they were at the time of the delivery and lading thereof on the aforeſaid ſhip, to the ſaid plaintiff did not deliver; but the ſame goods, &c. ſo improvidently and negligently did place, carry, and keep in the ſaid ſhip in the ſaid voyage, that, by the default of the defendants and their ſervants, &c. the ſaid goods, by the ſea-water coming into the ſaid ſhip, were ſpoiled and damnified.

* [479]

Upon *not guilty* pleaded, the cauſe being tried before the LORD HERBERT,

WE INSISTED *for the defendant*,

FIRST, That though this ſhip uſually carried goods between

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delay common right: and though ſuch commandments ſhould come, the judges ſhall not ceaſe to do right: and this is alſo made a part of their oath by the ſtatute 18 Edw. 3. ſt. 4. and by 1 Will. & Mary, ſt. 2. c. 2. ſ. 12. it is declared, "that "no diſpenſation, by *non obſtante*, of or to "any ſtatute, or any part thereof, ſhall be "allowed, but that the ſame ſhall be held "void, and of no effect, except a diſpen- "ſation be allowed of in ſuch ſtatute."

London

London and *Exeter*, yet the action ought to be brought againſt *the maſter*, for he received the goods, and ought to be anſwerable for them; and the maſter of the ſhip is no defendant, nor ſo much as joined.

SECONDLY, Beſides, if the action lies, all the owners ought to be joined, and there were ſeveral others not named; and the caſe of *Morſe v. Sluice* (*a*) was cited.

5 Co. 119. Cro. Jac. 152. 2 Stra. 820. 4 Bac. Abr. 47. 2 Bl. Rep. 695. 2 Bro. C.C. 338.

THIRDLY, Alſo we that are the defendants never ſpoke with the plaintiff, or made any *ſpecial undertaking*; and that no *bill of lading* was given by the maſter: and that a *common carrier* has his remedy againſt the hundred, but here is none.

And I put this caſe; ſuppoſe a houſe be burned by the neglect of a tenant, and other houſes are burnt by the means thereof, ſurely the landlord ſhall not be anſwerable; for the wrong is perſonal, the tenant "*tam improvide cuſtodivit ign'*," here the form is the ſame.

But THE LORD CHIEF JUSTICE ſeemed of opinion that we were liable; but that *the maſter* ought to be joined, or at leaſt *all the owners*.

Whereupon a ſpecial verdict was found (*b*).

(*a*) 1 Mod. 85. (*b*) See S. C. 1 Show. 29. 101. and 3 Mod. 321.

* The Attorney General *againſt* Capell, and others.

Caſe 435.

* [480]

IN THE EXCHEQUER.

Per breve in ligula brevium de Termino S. Hillar. anno primo finient. et ſecundo incipient. R. Regis Jac. 2.

EXTENT, reciting that *Moore* and *Thomas*, by bond, became indebted to THE KING the twenty-ninth of *September*, in the firſt year of *James the Second*, in a thouſand pounds; and that, by inquiſition taken the twenty-third of *December*, it is found that *John White*, and *Benjamin Mercer*, were indebted to the ſaid *Thomas* in four hundred and fifty pounds: and thereupon it is commanded, that inquiry be made of *White* and *Mercer*'s eſtate, on the twenty-third of *December*, *teſte* the twenty-fourth of *December*, returnable the twenty-third of *January* following.

An *extent in aid* is barred by a previous *aſſignment* of the debtor's goods, under a commiſſion of bankrupt; but not by the iſſuing of the commiſſion only.

W. Jones, 202. Bunb. 202. 3 Mod. 236. Packer, 126. 2 Stra. 978. 4 Term Rep. 408. Cook. B. L. 446.

The inquiſition found, that on the twenty-third of *December* they had eighty barrels of anchovies.

The defendants thereupon come in and plead, that, long before, *White* and *Mercer* were bankrupts; that commiſſions iſſued out againſt them; and that on the ſecond of *February* the commiſſioners made an aſſignment of thoſe barrels of anchovies.

THE ATTORNEY GENERAL v. CAPELL.

The Attorney General demurs.

The queſtion is, Whether the *extent* be good, the party being a bankrupt before?

I ARGUED, That at the time of the bankruptcy committed, the creditors, *viz.* *Moore* and *Thomas*, are entitled but to their ratable part, and then afterwards THE KING ſhall have but what he has a title to: in caſe the creditor be debtor to the king before, then he was a creditor for, and entitled to, his whole part, and the king ſhould have the benefit of the whole; and no act of bankruptcy ſhall afterwards ouſt THE KING of his remedy for his debt; for he not being bound by any of the ſtatutes of bankruptcy, ſhall not be in the leaſt prejudiced by them: but here *Moore* and *Thomas* were not indebted to the king at the time of the bankruptcy; by which *White* and *Mercer* became as dead in law, and could not do any act. Now the king's right to this remedy commences but from the firſt debt to THE KING, and therefore as to the quantity THE KING can have but the right of his debtor, though as to the manner of execution he has a prerogative; "*nemo enim plus* [481] "*juris poteſt transferre* * *quam habet:*" "*Poteſtas derivativa non* "*major quam primitiva.*" At the ſame rate they may after an aſſignment become debtors to THE KING, and ſo make an *extent in aid* the ſame with an *extent original*. And now ſuppoſe *White* and *Mercer* had, after an act of bankruptcy, and becoming bankrupts, contracted a debt to THE KING, &c. By the party's becoming a bankrupt, every man that was creditor to him becomes entitled to his ſhare; and all that time, the condition and intereſt of every creditor is fixed, and cannot be bettered by any act of his or the bankrupt's. Now there was no debt of record to THE KING before that: and in the caſe of an executor, if after the death of the teſtator a creditor by bond aſſign to THE KING, the executor may pay a judgment before it, becauſe it was not a debt of record to THE KING at the time of the teſtator's death; and ſo reſolved, in Trinity term, in the eighteenth year of *James the Firſt*, in the Exchequer (*a*). Here is the ſame reaſon.

But it was anſwered, that if the *extent* come before the aſſignment, it ſhall and muſt be preferred. See the like caſe in the twentieth year of *Charles the Second*, in the Exchequer, as to executors, &c. *Edward Lewis* was indebted to the king by bond, on the third of *March*, in the nineteenth year of *Charles the Second*; an *extent* iſſued on that bond, dated twenty-firſt *March*; the inquiſition finds *Lewis* poſſeſſed on the fifteenth *April*, and then *Captain Handbury* pleads his title, that *Lewis*, on the fifth of *March*, became a bankrupt; that the fifth of *March* a commiſſion iſſued; that the ſixth of *March* the commiſſioners found that *Lewis* was a bankrupt before the date of the commiſſion; that the twelfth of *March*, the goods in queſtion were ſeized by warrant from the Commiſſioners; that the twenty-firſt of *March* the commiſſioners of bankrupt aſſigned to the creditors, and thereby they became

(*a*) 2 Roll Abr. 159.

poſſeſſed:

THE ATTORNEY GENERAL v. CAPELL.

poſſeſſed: to this plea the Attorney General demurs generally, and judgment is given for the king; and although the goods were actually *in cuſtodia legis*, yet becauſe the *extent* came before the property was veſted by an aſſignment, it was held a good *extent*. Extents have been held good that have been made upon goods actually levied by virtue of a *fieri facias*, and * in the ſheriff's cuſtody, the *extent* coming before *a bill of ſale* made, ſo as the property was not altered (*b*). NOTA.

* [482]

(*b*) But ſee Audley v. Halſey, W. Jones, 202. Rex v. Pixley, Bunb. 202. Letchmen v. Thorogood, 1 Show. 12. 146. Upham v. Sumner, 2 Bl. Rep. 1294. and Rooke v. Dayrell, 4 Term. Rep. 498.

Tuckey *againſt* Flower.

Caſe 436.

ACTION on the caſe for theſe words, "She is *Ben Harden's* "common whore; he has lain with her ſeveral times in the "wheat barn at *Aſhton*;" by which words ſeveral that courted her in marriage did forbear, &c. Verdict for the plaintiff on a trial before my LORD HERBERT, and fifty pounds damages.

The words "ſhe "is *B. Harden's* "COMMON "WHORE" are not in themſelves actionable, and therefore muſt be laid *per quod*, &c. but it is not ſufficient to lay the *ſpecial damage* by a general allegation viz. "by which "words ſeveral "that courted "her in mar-"riage did for-"bear &c." S. C. Comb. 26. 28. 137. 1 Roll. Abr. 34. Cro. Eliz. 582. 3 Mod. 120. 1 Sid. 396. 2 Mod. 296. 1 Mod. 31. 1 Com. Dig. 8vo. edit. 274.

I afterwards moved,

FIRST, That theſe words are not actionable, for that they are words which import only a ſpiritual offence, and for which the party could be puniſhed only there, and conſequently *a libel* proper there for defamation. In the caſe of *Vaughan v. Scandiſh* (*a*) an action was brought for ſaying "thou art a whore, a baſtard-bearing whore, and "*Thomas Hall's* whore, and thou didſt play the whore with him at "ſuch a gate;" our words are the ſame, or rather ſtronger than theſe; in this caſe the place and perſon is mentioned, as in ours; and yet they were held not actionable, becauſe it was not alledged that ſhe had loſt her marriage, or ſuſtained a temporal prejudice; but, "thou hadſt *a baſtard* by him," is actionable, becauſe of the ſtatute of 7 *Jac.* 1. *c.* 4. which orders her to *Bridewell:* ſo that the words themſelves will not bear an action; and a world of caſes there are in *Rolle* (*b*) and others (*c*) to that purpoſe.

SECONDLY, That this allegation of damage is too general; that it ſignifies nothing; for firſt, it is ſuch as no anſwer can be given to it, nor can we tell what to prepare for our defence: beſides, in common experience on the trial in ſuch a caſe as this, the plaintiff is never put to prove that general allegation of damage; and if ſhe ſhould, we could never be ready to anſwer it: and in all the caſes where theſe words have been held actionable, a particular damage has been expreſſed, as in the caſe of *Davies v. Gardiner* (*d*) "There was a grocer that got her with child," there a ſpecial damage is laid on a communication of marriage between the father of the plaintiff, and one *Elcock* * by name, a man of ſubſtance. So in the caſe of *Dame Morriſon v. Cade* (*e*) "*Aſket* had the uſe of her body," (MEANING car-

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(*a*) Palm. 298.
(*b*) 1 Roll Abr. 33.
(*c*) 1 Com. Dig.
(*d*) 4 Co. 16.
(*e*) Cro. Jac. 162.

TUCKEY v. FLOWER.

nal copulation) and alledged there, that *the Earl of Kent* and others had communication with her, &c. And there are many cases where this general allegation is held naught, as that of "divers persons," &c. the same with ours as to special damage: and it was held naught in the case of *Norman v. Symond* (*f*). So in the case of *Wethered v. Brookebome*, (*g*) words of a dancing-mistress (SIR JOHN HOLT was of counsel in it) it was held that a general allegation is not good: there was the case of *Geatley v. Minues* (*h*) tried before my LORD NORTH for words spoken of a taylor, "He is a shuffling cheating fellow," and that thereby he lost divers customers; but the words were held not actionable, because it only says "he has lost divers customers," and does not say whom, &c. and the judgment was arrested, and we were forced to bring a new action, and to particularise several customers by name: this has been an allowed difference taken there every day, and upon the confidence of the difference we made no defence at the trial of this case.

LORD HERBERT. Although you have cited abundance of cases, and those direct, yet it cannot enter into my reason, but that these words carry damage in them; they import a great scandal; and suppose upon the report of such words no suitor ever comes to her, is not this ground for an action? here is a great injury done and no relief, unless she can name a suitor; perhaps these very words prevented her from having any: and what a poor reparation is a libel in court-christian for defamation; shall our law be so defective as not to give a remedy? I must satisfy my own reason, I think, as they are laid, they are and ought to be actionable.

WYTHENS *Justice*. This general allegation of damage has always been disallowed, and the words themselves without more are not actionable.

HOLLOWAY and WRIGHT, *Justices, ad idem*.

And so we had judgment *quod querens nil capiat per billam*.

(*f*) 1 Roll. Abr. 36. pl. 12.
(*g*) Trinity Term, 30 Car. 2. ante, page 18.
(*h*) In the Common Pleas.

The Second of James the Second.

IN

THE KING's BENCH.

Sir EDWARD HERBERT, *Knt. Chief Juſtice.*

Sir FRANCIS WYTHENS, *Knt.*
Sir RICHARD HOLLOWAY, *Knt.* } *Juſtices.*
Sir ROBERT WRIGHT, *Knt.*

Sir ROBERT SAWYER, *Knt. Attorney General.*

Sir THOMAS POWIS, *Knt. Solicitor General.*

The King *againſt* Browne, Corbet, and others. Caſe 437.

THE defendants appeared on an *habeas corpus*:—*Corbet* being an attorney, had, at *Browne's* ſuit, arreſted a ſoldier without leave and was committed to a meſſenger's cuſtody thereupon, and he was now diſcharged; becauſe the warrant was under the king's own hand, without ſeal, or the hand of any ſecretary, or officer of ſtate, or juſtice.

A warrant of commitment under the *ſign manuel* is bad; and the Court of King's Bench will diſcharge the party on *habeas corpus*.——1 Bac. Abr. 378.

Seamour and others *againſt* Paſhley. Caſe 438.

REPLEVIN. Avowry of a diſtreſs for rent, alledging *a poſſeſſion* for a certain term of years.

In replevin, AN AVOWRY under a diſtreſs for rent, a ledging a *poſſeſſion* under a term for years, is ſufficient.——Ante, caſe 196. 243. 2 Salk. 579. 5 Mod. 150. 1 Lev. 190. 1 Sid. 298. 1 Mod. 231. 2 Mod. 143. Nelſon's Lutw. 29.

SEAVOUR v. PASHLEY.

SIR JOHN HOLT. In debt for rent it is well enough, but not in avowry; becauſe in avowry we muſt traverſe ſome particular point; in caſe of the action of debt we can plead the general iſſue; therefore here you ought to ſhew the beginning of the eſtate. (*a*) A *que eſtate* cannot be of a term for years. (*b*) A difference is taken in that caſe of *Croke* between debt and avowry, for this laſt ſavours of the realty.

MR. POLLEXFEN. There is no difference, and if it be good in the one, it is good in the other; for both are only * remedies for rent; it is true, in *a formedon* or *real action*; here it is an action only between leſſor and leſſee; and this is between leſſor and leſſee, as that caſe of debt is; and as *Scavage's caſe* is in *Jones's Reports* there is no ſuch difference taken.

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THE COURT held it all one, and well enough.—Judgment for the avowant.

(*a*) Scavage v. Hawkins, Cro. Car. 571. Jones 453. (*b*) Co. Lit. 121.

Caſe 439. Britton *againſt* Buckworth.

Scire facias againſt an adminiſtrator.
1 Mod. 188.
2 Vent. 218.
Skin. 257.
3 Salk. 322.
2 Ld. Ray. 808.
1 Ld. Ray. 214.
2 Bac. Abr. 360.

DEBT on a bond in the court of Common Pleas againſt an adminiſtrator, who waſtes goods and dies inteſtate, leaving goods to the value of five hundred pounds, and debts of his own to that value.

A *ſcire facias* was brought upon the new ſtatute againſt his adminiſtrator, and he pleads payment of that five hundred pounds for debts on ſimple contracts of his inteſtate.

AND HELD good, and judgment for the defendant becauſe the waſting is the charge, and that is of no higher a nature, and by that ſtatute he is to be in the ſame caſe with his inteſtate, and he might have paid his own debts therewith.

Caſe 440. Dorrington *againſt* Edwin.

Defendant after judgment in replevin may bring *ſcire facias* againſt the pledges.
S.C. Ante, 421
S. C. 3. Mod. 36. S. C. Comb. 1. S. C. Skin. 244.

REPLEVIN removed by *certiorari*, and for not proceeding a *ſcire facias* was ſued againſt the pledges below: now argued again, and judgment for the plaintiff that the *ſcire facias* well lies. See 21 *Hen.* 6. 50. 9 *Hen.* 6. 58. 4 *Hen.* 6. 2. and *Raſtal's Entries*, 569.

Haughton

Haughton *againſt* Rugby. Caſe 441.

UPON motion to ſet aſide an execution, and to have reſtitution of goods levied, and a report of THE SECONDARIES to the Court.

A *fieri facias* executed after the defendant's death, is good.

S. C. Skin. 257. S. C. Comb. 53. 7 Mod. 2. 2 Stra. 882. 1081. 3 Peer Wms. 399. 2 Ld. Ray. 764. 849.

It was held, that a *fieri facias* delivered to the ſheriff, and executed after the defendant's death, though it did bear *teſte* before, is good, notwithſtanding the ſtatutes 29 *Car.* 2. *c.* 3. againſt frauds * and perjuries; for that was intended only for the benefit of purchaſers and ſtrangers, and not of the party or his executors. PER TOUT LE COURT, SIR JOHN HOLT, and TREMAINE counſel in the motion.

* [486]

Palmer *againſt* Allicock. Caſe 442.

PROHIBITION often argued, about the caſe of one ſon's dying inteſtate under age, to whom adminiſtration belongs, whether to the other ſons as *next of kin*, or to *the mother?* and a *conſultation* was granted.

If an inteſtate leave two ſons, and one of them die inteſtate, his ſhare of his father's eſtate ſhall go to his adminiſtrator, and not to the adminiſtrator of the father.

NOTE, The reaſon of three judges was, becauſe they had a juriſdiction; and of another, becauſe no intereſt veſted:

Tamen quære, For it ſeems if they proceed contrary to the ſtatute they ought to be prohibited; and it ſeems that an intereſt is clearly veſted by the act of diſtribution, and ſo has it been held in *Chancery* and the *Exchequer* all along.

S. C. Ante, 407. S. C. Skin. 218. S. C. 3 Mod. 58. S. C. Comb. 14.

The King *againſt* Baſpoole. Caſe 443.

INFORMATION for perjury. The perjury was aſſigned in certain depoſitions taken in *Chancery*, in a ſuit there depending, by commiſſion to examine witneſſes at *Norwich*.

A *copy of depoſitions* returned into Chancery taken under a commiſſion to examine witneſſes, are not admiſſible evidence on an indictment for *perjury* againſt the deponent, although ſworn to be a *true copy*, unleſs it be firſt proved that the deponent was *ſworn*, and that *he* made the *original depoſitions*. ——— Ante, caſe 155. Vide ante, caſe 1 & 155. S. C. Comb. 38.

Upon a trial here at THE BAR, the proſecutor produced a copy of the depoſitions examined in *Chancery*, and ſwore to be a true copy.

I being of counſel with the defendant, thereupon urged, that they ought to prove him ſworn, and that he ſwore ſuch things, for this was but a copy of what was returned into *Chancery* by commiſſioners, that are neither officers, nor upon oath. This I urged the rather, becauſe HERBERT *Chief Juſtice* had ruled it neceſſary in caſe of an affidavit, and would not allow of a copy of an affidavit filed, to be evidence in caſe of perjury.

And

THE KING v. BASPOOLE.

And HERBERT *Chief Juſtice* now taking the objection, it was long debated, and a difference alledged between an anſwer ſworn before a maſter in chancery, who was a ſworn officer.

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THE COURT * was divided.

HERBERT *Chief Juſtice*, and HOLLOWAY *Juſtice*, were with the objection, and WYTHENS and WRIGHT, *Juſtices*, on the other ſide.

So THE COURT being divided the copies were not admitted as evidence; the commiſſioners who took the depoſitions being all living, and might have been *ſubpœnaed* hither. And thereupon the defendant was found *not guilty*, without entering on the merits of the cauſe.

Caſe 444. Accourt *againſt* Swift and others.

Eaſter Term, 1 *Jac.* 1. *Roll.* 209.

To a joint *aſſumpſit* againſt three, each cannot ſeverally plead that "*he* "did not promiſe in "manner and "form, &c."

S. C. Comb. 37.

ERROR on a judgment in *Ireland*, in an action on the caſe on a joint *aſſumpſit* againſt ſeveral, *viz.* A. B. and C. A. let judgment go by default; B. pleads "*quod ipſe non aſſumpſit modo et forma* "*prout*, &c." and C. likewiſe "*quod ipſe non aſſumpſit modo et forma* "*prout*, &c." The iſſues are found for B. and C.

MR. POLLEXFEN *for the plaintiff*. The pleading is naught, for that they are charged with a joint promiſe, and therefore for one of them to ſay "*quod ipſe non*, &c." is no anſwer, but it ought to be "*quod ipſi non aſſumpſerunt*, &c." unleſs you would conſtrue "*non aſſumpſit*" to be "*non aſſumpſerunt*," and "*ipſe*" to be "*ipſi*."

SIR JOHN HOLT *è contrâ*. "*Modo et forma*" reſtrains it to the declaration well enough. *See* 1 *Sid.* 76. 7 *Hen.* 6. 33. *Legar v. Randal*, *Hill.* 24 & 25 *Car.* 2.

Adjournatur. (*a*)

(*a*) THE COURT at the firſt opening of the caſe ſeemed to agree with HOLT; but afterwards the judgment was reverſed. S. C. Comb. 38.

Caſe 445. Warwick *againſt* Skinner and another.

Prohibition to the ſpiritual court on a libel for calling a woman a *jade*, becauſe no averment that *jade* means *whore*.

PROHIBITION prayed to a libel in the *Court-Chriſtian* for defamation, by theſe words ſpoken to the huſband of the wife, "ſhe is a drunken jade; a cheating jade; and a ſtinking jade:" ſuggeſting in the libel that *jade* ſignified *whore*.

MR. POWEL inſiſted upon the caſe of *Pugh v. Jefferyes* (*a*) "Welſh jade," and "Welſh rogue;" that as there, ſo here, it was of an uncertain ſenſe, and needed an averment of its particular ſignification in the place where ſpoken.

(*a*) Cro. Eliz. 456. 2 Roll. Rep. 297.

MR.

Mr. POLLEXFEN *è contrâ*. The word "jade" is the ſame with "old whore," as an over ridden horſe is called "jade," and * they are malicious words ſpoken to the huſband concerning his wife.

WARWICK v. SKINNER. * [488]

The prohibition was denied PER CURIAM upon debate, becauſe the words were malicious:

Sed quære vim rationis, for an averment ſeems neceſſary, &c.

And MR. POWEL informed me that the next day they had a prohibition granted in the Common Pleas.

The King *againſt* Johnſon.

Caſe 446.

THE DEFENDANT, who was the author of "JULIAN THE APOSTATE", being now again convicted on a trial at THE BAR, for publiſhing another ſeditious Libel, intituled, "AN ADDRESS TO THE ARMY," took ſeveral exceptions thereto.

It is no objection to an information, for a libel to ſay *inter alia*, although the whole libel was recited.
S. C. Com. 36. S. C. 7 St. Tr. 645.
Vide ante, 436.

As, FIRST, that the information was *inter alia* and the whole was recited except *finis*. But that was over-ruled and the jury had now found it ſo; and if any advantage could be taken upon that, it muſt be upon the trial.

SECONDLY, He excepted that there was no *averment*, that there was an army in *England*. But that was over-ruled likewiſe.

Rex v. Horne Cowp.

And his behaviour being very inſolent, he was ſentenced to the pillory three days, and to be whipped from *Newgate* to *Tyburn*; and becauſe the puniſhment was thought infamous, (*a*) therefore direction was given for care to be taken that he ſhould be degraded before he ſuffered that puniſhment.

Pillory for libel renders the party infamous.

And accordingly THE RECORD and *Mr. Johnſon* both, were brought before the right reverend fathers in God, the lord biſhop of *Durham*, the lord biſhop of *Rocheſter*, and the lord biſhop of *Peterborough*, (commiſſioners appointed by his majeſty to exerciſe all manner of eccleſiaſtical juriſdiction within the dioceſs of *London*, during the ſuſpenſion of the lord biſhop of *London*) who with ſeveral of the moſt eminent divines of the city, met in the chapter-houſe of *St. Paul's*, where the ſaid *Mr. Johnſon* according to the eccleſiaſtical laws, in a full court, received ſentence of degradation, and was degraded and deveſted accordingly, and delivered over as a meer lay perſon into the hands of the ſecular officer, to undergo the puniſhments above-mentioned.

If a clergyman be convicted of *a libel*, and ſentenced to the pillory, he may be degraded.

(*a*) But ſee the caſe of Pendock v. Mackinder, Wilſ.

Caſe 447.

* [489]

* The King *againſt* Drake.

RECORD returned by *certiorari*, of a *conviction* on the ſtatute 13 Car. 2. c. 10. for hunting deer in a park.

S. C. Comb. 35. Ante, caſe 419. 4 Com. Dig. "Juſtice of "the peace" (B 47.)

DEVON, *ſſ.* MEMORANDUM *quod quarto die Auguſti anno regni domini noſtri Jacobi ſecundi dei gratia Angliæ Scotiæ Franciæ et Hiberniæ regis, fidei defenſ. &c. primo,* JOHANNES SHEFFIELD *de* PLYMPTON BEATÆ MARIÆ *in com.* DEVON. *gen. apud* OLLETON *in eodem com. venit coram nobis* RICHARDO HILLERSDEN *et* THOMA HELE *arm. duobus juſticiar. dict. domini regis ad pacem in com. præd. conſervand', ac ad diverſ. felon. tranſgr. et a' malefacta in eodem com. perpetrat. audiend. et terminand. aſſignat. et præſtitit ſacrament. ſuum corporale coram nobis (eodem* JOHANNE SHEFFIELD *adtunc exiſten. credibili teſte in hac parte) quod* WILLIELMUS DRAKE *de* IVYBRIDGE *in com.* DEVON. *præd. arm. et* HENRICUS CRYMES *de* BUCKLAND MONOCHOR. *in eodem com. gen. quarto die Julii anno primo ſuprad. vi et armis, &c. parcum* RICHARDI STRODE *arm. in quo damæ adtunc et diu antea ac continue poſtea hucuſque cuſtodit. fuerunt ſcituat. et jacen. infra paroch. de* PLYMPTON BEATÆ MARIÆ *in com. præd. abſque conſenſu præfat.* RICHARDI STRODE *arm. adtunc exiſten. veri proprietor.* (ANGLICE owner) *ejudem parci aut alicujus al. perſon. adtunc habent. cuſtod.* (ANGLICE being intruſted with the cuſtody) *ejuſdem parci illicite fregerunt et intraverunt et adtunc et ibid. unam damam fulvam* (ANGLICE one fallow-deer) *in eodem parco exiſten. depaſcent. cum quibuſdam canibus venaticis ſuis illicite ſtertat. fuerunt et fugaverunt* (ANGLICE courſed) *contra formam ſtatut. in hujuſmodi caſu edit. et proviſ. ideo conſiderat. eſt per nos præd.* RICHARDUM HILLERSDEN *et* THOM. HELE *juſticiar. ut præfertur. exiſten. quod præfat.* WILLIELMUS DRAKE *et* HENRICUS CRYMES *de præmiſſis impoſit. ſuper teſtimon. præd. convict. ſunt. ac quod quilibet eorum præfat.* WILLIELMI DRAKE *et* HENRICI CRYMES *ſeparaliter ſatisfaciat ſummam vigint. librar. pro offenſa præd. unam medietat. præd. earund. ſummar. præfat.* JOHANNI SHEFFIELD *exiſten. informatori et al. medietat. præfat.* RICHARDO STRODE *arm. exiſtent. proprietar.* (ANGLICE owner) *damæ præd.*

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ſolvend. ſecundum formam ſtatut. præd. in cujus rei * *teſtimonium nos præfat.* RICHARDUS HILLERSDEN *et* THOMAS HELE *huic recordo manus et ſigilla noſtra reſpective appoſuimus die anno et loco prius ſuprascrip.*

I MOVED to quaſh this conviction upon theſe exceptions.

A conviction on the 13 Car. 2. c. 10. for *hunting* deer, is good, although it alſo ſtate that the defendant *broke* the park.

FIRST, Here two juſtices, upon a ſingle oath, have convicted a man for breaking and entering a park, and courſing a deer, and impoſed twenty pounds penalty for it: now there is no ſtatute againſt breaking the park; the offence by 13 *Car.* 2. *c.* 10. is courſing, &c. and the penalty they have impoſed is *for the offence aforeſaid*, generally.

But THE COURT ſaid that the offence was *hunting* the deer.

On a conviction ſtating that A. hunted deer, and broke the park, *without conſent of the owner*, theſe words ſhall apply to the *hunting* as well as to the *breaking*.

SECONDLY, They have not ſaid that we did courſe without their conſent, but only that we did break the park without their conſent:

NOW

now we might break the park without their conſent, and have their conſent to hunt notwithſtanding: thoſe words, "without conſent," can never go to the whole, for it is not placed in the beginning nor in the end, but only in the firſt clauſe, deſcribing the manner how, juſt before the adverb *illicite*; then comes the other clauſe, *et unam damam illicite fugaverunt*.

THE COURT ſaid that the *abſque conſenſu* went to the whole.

THIRDLY, Several penalties for one courſing, whereas the deſign of the ſtatute, by the dividend of the penalty, ſeems to be only to give a ſatisfaction for the deer ſpoiled.

By 13 Car. 2. c. 1. *every perſon* who is out when a deer is unlawfully hunted, is liable to the penalty.

THE COURT ſaid that by the words of the ſtatute every ſeveral perſon forfeit twenty pounds a piece.

FOURTHLY, The ſtatute requires the oath of one or more credible witneſſes: now here is none but *the informer* to whom the moiety of the penalty is given, whereas by law he cannot be a witneſs becauſe a party; no more in this caſe than in any civil action, or in a *qui tam* upon any penal ſtatute; and the owner of the park may be a witneſs as well as the informer; which will not be pretended: beſides, the ſtatute requires a credible witneſs, which ſurely he cannot be, that is to have a benefit by the conviction; that is a party intereſted. In the caſe of an information upon the ſtatute of uſury, the parties to the uſurious contract ſhall not be admitted witneſſes, becauſe they are *teſtes in propria cauſa*, (*a*) and ſo was it adjudged in *Smith's caſe*, (*b*) and that caſe was much ſtronger, for there was another informer, and ſo he was not a party, but only was to have a benefit on ſuch conviction,* by the ſtatute's avoiding his bond or ſecurity. Upon an indictment of perjury on the 5 *Eliz. c.* 9. he againſt whom the verdict is given ſhall not be a witneſs, becauſe that afterwards he by action ſhall recover twenty pounds, and ſo it was adjudged in the caſe of one *Bacon* indicted for perjury (*c*) and the reaſon of it ſeems good, becauſe he is a party concerned in intereſt in the effect of ſuch proceeding. In our caſe it appears that he is the only witneſs, and, by the ſame record, it appears that he has twenty pounds for ſuch teſtimony: beſides, this ſtatute gives no part of the penalty to the king, ſo that he is not concerned in intereſt; all is given to the informer and owner; and to allow them to be witneſſes in this caſe, which is *quaſi* their own, is ſomewhat hard, for they cannot be ſuppoſed indifferent, much leſs credible witneſſes in that behalf.

If a ſtatute direct a conviction on the oath of one credible witneſs, and give a moiety of the penalty to the informer, a conviction on the ſingle teſtimony of the informer is bad.

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THE COURT ſtuck a little at this exception.

LORD HERBERT *Chief Juſtice*, declared it unreaſonable that it ſhould be ſo, but here was a particular law which made the offence, and creates a particular form of proceeding.

WYTHENS *Juſtice*. The two juſtices of the peace are ſole judges of the credibility of the witneſſes,

(*a*) 12 Co. 68. Co. Lit. 6. (*b*) Trinity Term, 8 Jac. 1. (*c*) 2 Roll. Abr. 685.

And

THE KING v. DRAKE.

And ſo WYTHENS, HOLLOWAY, and WRIGHT *Juſtices*, all *ſeriatim* and *ſeparatim*, delivered their opinions that it was well enough. (*d*)

And ſo all theſe exceptions were diſallowed.

(*d*) But it is now ſettled that the informer cannot be a witneſs, where he is intitled to any part of the penalty. See Rex v. Stone, Mich. Term. 2 Geo. 2. where it is ſaid that divers convictions had been quaſhed for the ſame reaſon before. 2 Ld. Ray. 1545.

Caſe 448. Jennings *againſt* Hawkey.

Trinity Term, 2 *Jac.* 2. *Roll.* 121.

The PLEA ROLL may be amended by *the file* at any time. S. C. 1 Vent. 261. S. C. 2 Lev. 121. S. C. 3 Keb. 350. 371. 509. 3 Mod. 113.

DEBT on a bond brought againſt the defendant as executor:

It was moved in arreſt of judgment, that it was in the *debet* and *detinet*, and therefore naught;

But becauſe the declaration on *the file* was right, being * in the *detinet* only, and the declaration delivered was right, and the *tranſcript* ſent down to be tried was right, although *the roll* made up here were naught; YET IT WAS HELD that it ſhould be amended, it being agreed for a rule, that THE PLEA-ROLL ſhall be amended by THE FILE at any time.

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An exception cannot be taken to the *juriſdiction* after a *plea in chief*. S. C. Comb. 30. 48. S. C. Carth. 18.

Then ANOTHER EXCEPTION was moved, that this was tried at *Cheſter* by *mittimus*, which being a county-palatine, ought not to be as this declaration is laid.

And as to this exception it was adjourned until the next term (*a*). See 12 *Co.* 114. *Hutt.* 59. 4 *Inſt.* 213.

(*a*) It is ſaid, S. C. Comb. 48. that the Court gave judgment for the plaintiff.

Caſe 449. Harman *againſt* Harman.

Trinity Term, 1 *Jac.* 2. *Roll* 181.

To debt on bond, an executor may plead a *judgment recovered* on a ſimple contract, averring that he had no notice of the bond. S. C. Comb. 35. on Wills, 379. Wms. 402. notis.

DEBT on a bond againſt the defendant as executor; who pleads payment of a debt on a ſimple contract before notice: the plaintiff demurs.

MR. PORTER argued, that it would be a miſchievous inconvenience, if a dormant bond, of which there is no ſort of notice, might oblige them ſeven years after all the aſſets are paid upon debts, S. C. 3 Mod. 115. 5 Co. 82. 3 Lev. 114. 2 Stra. 1028. 2 L. L. Ray. 1391. Rich. 5 Com. Dig. "Pleader" (2 D 9) Espinas Dig. 2 edit. 251. 2 Bl. Com. 511. 3 Peer

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though of an inferior nature. Between debts of an equal nature there is no need of notice: judgment on debt on a ſimple contract, though obtained againſt the executor, may be pleaded in bar to bonds; he cited 2 *And.* 157. and ſhewed what an unreaſonable thing it is to force an executor to ſtand out a ſuit to anſwer coſts *de bonis propriis*, when he knows the debt demanded on a ſimple contract is really due, and he has aſſets, and no notice whatſoever of any debts of an higher nature. In the caſe of *Brooking v. Jenning*, VAUGHAN *Chief Juſtice*, ATKINS and ELLIS *Juſtices*, were of opinion, that debts upon ſimple contracts may be paid before bonds, unleſs the executors have timely notice given of ſuch bonds.

THE COURT. It ſeems reaſonable; but the difference uſually taken has been, where the payment of ſimple contracts is *voluntary*, and where *compulſive*.

Adjournatur. (*a*)

(*a*) THE COURT agreed that a judgment upon a *ſimple contract* debt may be pleaded in bar to an action of debt upon *bond*; and that it is no *devaſtavit* in an executor to pay a debt upon ſuch a contract before a bond debt of which he had no notice, and relied on the caſes of Edgecombe v. Dee, Vaugh. 89 to 105. and Brooking v. Jennings, 1 Mod. 174. S. C. 3 Mod. 115; but it was adjourned, and in Michaelmas Term, 3 Jac. 1. judgment was given for the *plaintiff*. S. C. Comb. 115. It ſeems however to be ſettled that an executor may plead a *judgment recovered* on a ſimple contract to an action of debt on bond, unleſs he has notice of ſuch bond, for otherwiſe an executor might be ruined by the obligee keeping the bond without giving notice of it, Davis v. Monkhouſe, Fitzg. 76. Bull. N. P. 178. but in the caſe of Sawyer v. Mercer, where an executor, to an action of debt on bond, pleaded a *judgment confeſſed* on the preceding day in a ſimple contract debt, the Court was clearly of opinion that the plea was bad, becauſe it did not aver *that it was without* NOTICE *of the plaintiff's demand*; for in ſuch caſe only is an executor excuſed. 1 Term Rep. 690. See alſo Morrice v. Bank of England. 3 Peer Wms. 402. notis.

• Aldridge *againſt* Drake.

Caſe 450.

Eaſter Term, 2 *Jac.* 2. *Roll* 163.

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TRESPASS for an aſſault and battery, and falſe impriſonment for thirteen years; the defendant pleaded the ſtatute of limitations generally; the plaintiff replied within ſix years before, &c. verdict general for the plaintiff, and ſixty pounds damages given.

To an action of falſe impriſonment for thirteen years, if the defendant plead 21 Jac. c. 16. generally; a REPLICATION that a writ was ſued out on ſuch a day, and that it was within ſix years from that time, and A GENERAL VERDICT thereon, are good. S. C. 3. Mod. 210. S. C. Comb. 26. Ray. 61. 1 Keb. 389. 1 Ld. Ray. 383. 2 Ld. Ray. 1099.

IT WAS MOVED *in arreſt of judgment*, that the verdict is incoherent with the plaintiff's replication, for that is within ſix years, and the verdict finds him guilty of all the thirteen years in the declaration.

SIR JOHN HOLT. An action may be brought at any time within ſix years after his impriſonment, by the proviſo in the ſtatute 21 *Jac.* 1. *c.* 16. Beſides, every day is a new impriſonment and a new treſpaſs; and you will intend the verdict to be only for the ſix years, and the time

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time is not material otherwiſe. *Saunders v. Edwards*, (*a*) 1 *Sid.* 95. 1 *Cro.* 139.

And by the COURT held well enough. Judgment for the plaintiff.

(*a*) 1 Sid. 95. Cro. Car. 139.

Caſe 451. Hodges *againſt* Nicholas.

The miſpriſion of the clerk, in a return to a writ of enquiry, may be amended though the omiſſion be material. S. C. 1 Lut. 865. S. C. N. Lut. 268. S. C. Comb. 33. S. C. Skin. 253. Ante, 491.

CASE: judgment by default: writ of enquiry; and judgment, &c.

SIR JOHN HOLT, after error brought, moved to amend an omiſſion in the return of the writ of inquiry, viz. "*virtute brevis et per ſacramentum*," becauſe the return was right; but in making up the record the clerk had omitted thoſe words; and if the omiſſion were in the moſt material thing, it ought to be amended, the clerk having a good record to guide him and he miſtaking it: it is but the clerk's omiſſion, and amendable, the writ of inquiry upon *the file* being right.

LEVINZ, *Serjeant*, oppoſed the amendment, and laboured it very hard, it being a matter of *ſubſtance* and not of *form*, and cited *Latch.* 203. *Palmer's Rep.* 123. *Jones* 199.

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* But by THE COURT, It being only a miſtake of the clerk, though it be material, yet it is amendable, and that without *coſts*, it being after the ſuit is ended here.

Caſe 452. Stampe *againſt* Kinſey.

An execution, levied before judgment *ſigned*, though after the *teſte*, is void.

UPON a demurrer, it appearing on the pleading, that an execution was levied before the judgment was ſigned, though after the firſt day of the term to which the judgment related, and after the *teſte* of the *fieri facias*, YET HELD naught.

Caſe 453. The King *againſt* Oſmond.

A perſon who reſides on a *copyhold* worth only 15*s.* a year may be removed if he become chargeable to the pariſh. *Sed quære.*

THE DEFENDANT, an inhabitant of *Edgeworth* in the county of *Middleſex*, having a wife and children, and very poor, purchaſed a copyhold eſtate of about fifteen ſhillings a year in *Stanmore* in the ſame county, which coſt fifteen pounds, and a month after came with his family there to live upon the ſame.

He is returned, by the two next juſtices, to *Edgeworth*; and upon an appeal to the quarter-ſeſſions they order him back to *Stanmore*, upon

upon this ſuppoſition, that every man may live upon his own ſoil, and is not to be removed.

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This order is returned into this court by *certiorari*, and the order of ſeſſions quaſhed: THE COURT being of opinion, that unleſs he have or do rent ten pounds a year, though he have twenty or forty ſhillings a year *freehold* of his own, yet if he be chargeable to the pariſh, he may be removed by the ſtatute 13 and 14 *Car.* 2. *c.* 12. (*a*)

(*a*) It is ſettled that a perſon who is admitted into a copyhold eſtate for life purchaſed by himſelf, although worth only twenty-five ſhillings a year, cannot be removed from ſuch eſtate, Eaſter Term, 11 Anne, Rex v. Edgware, Foley 257. 2 Bott's P. L. 623. But by 9 Geo. 1. c. 7. ſ. 5. "no perſon ſhall gain any ſettlement "in a pariſh by virtue of any *purchaſe* of "any eſtate or intereſt in ſuch pariſh, "whereof the conſideration for ſuch pur-"chaſe doth not amount to the ſum of "THIRTY POUNDS *bona fide* paid, for any "longer or further time than ſuch perſon "ſhall inhabit on ſuch eſtate, and ſhall "then be liable to be removed to ſuch pa-"riſh where ſuch perſon was laſt legally "ſettled before the ſaid purchaſe and in-"habitancy therein;" and ſince this ſtatute it has been held that the ſurrender of a copyhold eſtate is a *purchaſe* within the meaning of the legiſlature, and therefore, unleſs it be worth thirty pounds, it will not gain the purchaſer a ſettlement, Rex v. Sawbridgeworth. 2 Bott's P. L. 626. pl. 557. Rex v. Warblington, 1 Term. Rep. 241.

Claxton *againſt* Swift.

Caſe 454.

If the *indorſee* of a bill, on default of payment by the *acceptor*, recover againſt the *drawer*, but do not take out execution, this RECOVERY cannot be pleaded in bar to a ſecond action on the ſame bill by the ſame *indorſee* againſt the *firſt indorſer*; for though the indorſee has recovered *damages* he has not received *ſatisfaction*.

S. C. Ante 441. S. C. 3 Mod. 86. S. C. 1 Lutw. 878. S. C. N. Lut. 270. S. C. Skin. 255. 2 Stra. 733. 702. 817. Dougl. 250. 1 Term. Rep. 167. 4 Term. Rep. 691. 1 H. Bl. Rep. 80 notis.

CASE on the cuſtom of merchants, againſt the defendant as *indorſer* of a bill of exchange; the defendant pleads a recovery by *the plaintiff* againſt *the drawer*; the plaintiff demurs.

This* term *I argued for the plaintiff* (*a*) that this matter which the defendant has pleaded is no bar, for that, I think, is the only queſtion, for I know of no exception taken to the plaintiff's declaration. Then ſuppoſing both the *declaration* and the *plea* to be true, as in fact they are, and now muſt be taken ſo, the ſole queſtion is, whether their plea be any anſwer to our charge?

FIRST, To conſider *the declaration*; it is founded upon a ſpecial promiſe or contract, which the law ſuppoſes and raiſes by virtue of the *cuſtom of merchants* upon the fact which we have alledged. The cuſtom of merchants is, that whatſoever merchant or other trading perſon ſhall indorſe, or ſuperſcribe any note or bill of exchange, and, by ſuch indorſement, direct the acceptor of ſuch bill to pay its contents to another, that he thereby becomes chargeable to pay that ſum himſelf, in caſe the indorſee do not otherwiſe receive it. The fact we alledge is this, that a bill was drawn and directed to be paid to the defendant; and that he by indorſements ordered its contents to be paid to my client the plaintiff. Now, upon this cuſtom and this fact, I ſay, the conſtruction of law, upon this whole matter, is, that the indorſor, the defendant, has promiſed to pay the ſum to my client in caſe the acceptor do not; and this is our charge, that in conſideration of this cuſtom and this fact, the defendant aſſumed, &c. The law ſays

(*a*) See this caſe argued by MR. POLLEXFEN and MR. THOMPSON, ante 441.

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this is a good conſideration; and it ſays further, that if we prove the conſideration, *viz.* the cuſtom and the fact correſponding thereto, we need not prove any actual promiſe; but the law and your lordſhip will ſuppoſe one. So that here is an *aſſumpſit* in law created by his indorſing the bill to us; and it was *ſub conditione*, that if the bill was not paid, then he would pay us; and ſo is the cuſtom laid to be; and we have averred that the money was not paid. This allegation muſt be agreed to be neceſſary in every declaration of this kind; and had it been omitted they would undoubtedly have demurred to our declaration; * for it is as neceſſary here to ſay that the money was not paid, as it is in a *ſcire facias* againſt the bad, to ſay that the plaintiff is not ſatisfied of his debt and damages. To this our charge they come and anſwer thus, you have ſued the drawer, and recovered a judgment againſt him, and he has not paid you, and therefore I will not pay you; the drawer was bound to pay you as well as I, if the acceptor did not, and therefore I ſhall not pay you neither. Now, my lord, there is no plea that can be a good bar to any action, but what is in reaſon a good anſwer to, or evaſion of, the matter charged in the declaration; and I humbly conceive this is no ſort of anſwer to our charge. We charge him upon a proper, ſeveral, and reſpective contract, promiſe, or agreement of his own, and here is nothing of election in this caſe, as I hope to evince preſently; no more of election than in caſe of two obligors on a joint and ſeveral bond. This of the defendant's is a ſeveral contract in law, different from that of the drawer's; he was the original debtor; the indorſor is as a *fidejuſſor*, a ſecurity, who by implication, by conſtruction of law, and by virtue of the cuſtom of merchants, undertakes to pay this money to my client, in caſe the drawer, who was the firſt debtor, nor his ſervant to whom the bill was directed, did not pay it. And the more indorſors there are, the ſtronger is the bill always eſteemed upon the exchange (if before the day of payment) and of greater real worth is it in itſelf, becauſe more men are bound to the payment of it. It is true, it has been held in this court in the caſe of *Brown v. London* (*b*) that debt or an *indebitatus* will not lie againſt an acceptor or indorſor; but the chief reaſon there was, becauſe the Exchequer had ruled it ſo before, and they would not contradict their judgments for uniformity's ſake; and the reaſon of law given was, becauſe the drawer was the original debtor, and the others but collateral; and therefore they ſaid the ſpecial matter ought to be ſet forth, as we have done in our declaration. But * that does not deny, nay, it rather affirms the caſes of *the drawer* and the *indorſer* to be different; it is true, it is the ſame ſum, the ſame bill, but yet the promiſes which the law implies are ſeveral. Now, my lord, I would obſerve to your lordſhip, the natural reaſon why the indorſer is chargeable; and that is, becauſe he is ſuppoſed to have received the value or other conſideration from me, for aſſigning to me this bill; and it has been ruled often, that "*value received*" is implied in every bill and indorſement, as much as when they were written *in totidem verbis*. Now the law ſuppoſes (and that is the ſuppoſition which firſt grounded this ſort of contract or engagement

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(*b*) 1 Mod. 285. S. C. 2 Keb. 695. S. C. 1 Lev. 298. S. C. 1 Vent. 152. S. C. 1 Freem. 14.

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in the civil law, and amongſt merchants here) that if, at the time of the making this indorſement, my client ſhould have aſked the defendant, "But what if this bill be not paid?" he would have anſwered, "The drawer is a good man." But what if the drawer ſhould fail?" he would have anſwered, "Then I will pay you:" all this is as ſtrongly implied as if it had been written in expreſs words. So that our caſe is no more than this, *Hughes* promiſes that if the acceptor do not pay the bill he will; and the defendant promiſes, that if the bill be not paid he will pay it; for we muſt ſtill alledge a *minime ſolut. exiſten.* as I ſaid before. They are ſeveral *aſſumpſits* upon ſeveral foundations; and a promiſe by parol, or a promiſe implied in the law, is the ſame with an engagement by bond, as to this purpoſe; and a judgment againſt one is no more a bar againſt ſuing the other in the caſe of a promiſe, than it is in the caſe of a bond; both the actions are founded upon contracts, the one expreſs, the other implied: our action, at the leaſt, reſults *ex quaſi contractu*, and *non aſſumpſit* is the general iſſue to it. There is nothing can diſcharge the defendant of this his undertaking, but either payment at the day by the acceptor, or ſatisfaction afterwards by ſome body; for he has undertaken to ſee it paid: nothing leſs than that can be any bar: as it is neceſſary for us to alledge a non-payment to make him chargeable; * ſo it is neceſſary for him to alledge a payment or ſatisfaction to diſcharge himſelf; and he does not deny his *aſſumpſit* but admits it by his plea. Now it is agreed, that in the caſe of two obligors, judgment againſt one is not pleadable in bar by the other, for nothing leſs than ſatisfaction will diſcharge the debt: an execution againſt one without ſatisfaction will not diſcharge the other; and ſo is the caſe of *Blomfield v. Uſewick*, (*c*) and *Whiteacre's caſe* (*d*) where it is reſolved that nothing but a ſatisfactory or valuable execution is a bar, though there the defendant be but one, the ſum the ſame, the writing the ſame; but becauſe the undertaking is ſeveral, it is therefore ſo held there, it being for a debt; and, by judgment againſt one, the nature of the debt is not altered or changed as to the other. Now the ſame reaſon will hold here in our caſe, here is no ſatisfaction pleaded, nor ſo much as an execution; by the plaintiff's judgment againſt *Hughes*, the nature of the defendant's promiſe or contract is not changed, but his *aſſumpſit* to ſee us paid this debt ſtill continues; and the money owing upon the bill remains ſtill due. This is a debt by law, and intereſt is always given upon theſe bills of exchange: in *Slade's caſe* (*e*) it is reſolved ſo; for a plaintiff in an action of the caſe on an *aſſumpſit* ſhall recover damages, not only for the ſpecial loſs which he had, if any ſuch there were, but alſo for the entire debt; theſe are the words of the book. Our action is not founded upon any tort; our declaration has no general iſſue but *non aſſumpſit*; and that was the plea pleaded in the action they have ſet forth. Here is nothing of an election in the caſe, for both the drawer and the indorſer, and the acceptor, are all chargeable on their ſeveral promiſes: can it be pretended that this plea would be good in the mouth

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(*c*) 5 Co. 86. Moor 459. Cro. Eliz. 378.
(*d*) Cro. Car. 75.
(*e*) 4 Co. 94.

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of the acceptor, whoſe undertaking is diſtinct, and upon quite another account than that of the drawer? And this of the defendant is as ſeveral and diſtinct as that: it cannot be pretended that here is
* [499] ſuch an election * as in the caſe of two remedies for rent, as annuity, or diſtreſs; for then the very firſt act would determine our election; then our bare ſuing of *Hughes* would be pleadable in bar, which no man will affirm: then the judgment without ſatisfaction can be no bar; for, as I ſaid before, it alters not the defendant's undertaking. As to the caſe of *Browne* v. *Wotton* (*f*), where trover was brought for goods, and the defendant's plea that he had brought his action for the ſame goods againſt another, and had recovered, and had the defendant in execution, was held a good bar, that caſe, if it muſt be agreed for law, does not affect ours. For firſt, there was an execution pleaded, which is the end of the law. Secondly, That was an action founded upon a tort, and ours is an action of right. Thirdly, There the action being founded on a wrong, the damages were uncertain, until the plaintiff had judgment, and reduced it to a certainty. Beſides, by that recovery in trover of damages, the property of the goods was changed and veſted in that defendant againſt whom the plaintiff recovered, and the plaintiff could not ſeize them again. Before that time it was made a queſtion whether judgment and execution with a ſatisfaction be pleadable by one treſpaſſer; and it was held, that with a ſatisfaction it was a good bar, but without it not ſo; and ſo it was held in *Morton's caſe* (*g*). The reaſon of *Littleton's text* (*h*), that a releaſe to one treſpaſſer ſhall be a bar for others, is, becauſe the releaſe acknowledges the plaintiff to be ſatisfied for the wrong; *et unica tantum erit ſatisfactio*. And it was never pretended until that caſe of *Brown* v. *Wotton*, that a bare judgment ſhould be a bar. But my lord, in all the books where that caſe is reported (*i*), there is this difference taken between trover and treſpaſs, and debt and caſe, the one founded on *a tort*, the other on *a right*, that in the one the damages are uncertain,
* [500] in the other the ſum in demand * is certain: theſe are the very words of the book in *Moor's Reports* (*k*). Now ours is not ſuch an action for damages as treſpaſs; it is true, ours is for damages, *ratione non performationis*, but the *aſſumpſit* is for a particular ſum; our demand is for a duty certain, whereon intereſt is due, and uſually given by way of damage; and caſe and debt are much of a nature; and caſe on an *indebitatus* and an action of debt may be pleaded in bar to each other; and ſo is *Slade's caſe* (*l*). Until I am ſatisfied of my duty, no proceeding againſt one can diſcharge the other; and it was never pretended that judgment on one man's promiſe, can diſcharge another of his promiſe, though the ſum be the ſame. Indeed in treſpaſs by the judgment againſt one, the uncertain damage is reduced to a certainty, and changed into another nature, from an action for a wrong, to an action of right; and he ſhall never reſort back to demand the uncertainty again; but that in our caſe it is otherwiſe muſt be agreed to me. If two men do by

(*f*) Cro. Jac. 73. Yelv. 67. Moor, 762.
(*g*) Cro. Eliz. 30. See Bro. Abr. "Judgment," 98.
(*h*) Sect. 376.
(*i*) Cro. Jac. 73. Moor, 762. Yelv. 67.
(*k*) Moor, 762.
(*l*) 4 Co. 94.

writing

writing covenant ſeverally, and not jointly, each for himſelf, and not one for another, that J. S. ſhall pay me twenty pounds on ſuch a day, I believe it will not be contended, but that if the money be not paid I may ſue either, and yet judgment againſt one ſhall not be pleadable by the other. The reaſon is becauſe their engagements are ſeveral; and they are the ſame here by conſtruction of law; and yet this is an action ſounding in damages, but reſults not *ex maleficio* but *ex contractu*; and ſo does ours. In *F. N. B.* 135. there are theſe words, "A man may ſue divers writs of warranty *des charters verſ. divers hommes*, if he have divers warranties againſt them, and he ſhall recover ſeverally againſt them;" and the reaſon is, becauſe the engagements are ſeveral, though the lands are the ſame; and ſo in our caſe they are ſeveral undertakings or promiſes, though for the ſame thing. It is true, theſe actions are not of any long ſtanding, ſo as to have many book-caſes concerning them; for by the ſtatute of 5 *Rich.* 2. *c.* 2. none could draw bills, or return money beyond the ſeas, without * leave or licence firſt obtained of the king; but * [501] at this day it ſeems otherwiſe by its common practice, through the indulgence of our kings. *Reg. Origin. fol.* 194. The neceſſity of trade and commerce, and the uſefulneſs and convenience of tranſferring money by bills of exchange, has introduced the ſame; and the civil law allowing them in other nations, has occaſioned their approbation here; and amongſt them the rule is, *ubi literæ excambii non habuerunt effectum, durat prima obligatio*; and I think the ſame rule ought to hold with us. This and every indorſement is as a new bill of exchange, and has all the requiſites and parties that a bill has, as "*pray pay, &c.*" and a man that has a bill indorſed, has as it were two bills for the ſame ſum: and it is moſt true, this action is not joint, and cannot be brought both againſt the drawer and indorſer, for that the aſſumptions are at ſeveral times, and upon diſtinct conſiderations. The great objection is, that we have here inverted the courſe, and ſhall deprive ſome of them of their remedies, if we ſhould be admitted to reſort back to the indorſer; but I humbly conceive not; for that our judgment againſt *Hughes* will not be pleadable againſt the defendant, if he ſue him after he has paid us; for nothing but ſatisfaction can excuſe any of them againſt us, or any other; and a ſatisfaction will be a good ground for an *audita querela*, as in the caſe of the two obligors: we have rather purſued the right method in ſuing the firſt obligor, the drawer, the original debtor, and not finding ſatisfaction from him, we reſort to the defendant, who is likewiſe chargeable, as I hope we may in this action. For the matter of election, I would deſire to know of them on the other ſide, when will they ſay our election is determined? If at any time ſurely it muſt be at the firſt ſuit, but that will be more difficult to be determined: why by the judgment; that alters nothing, it was a duty before, it founded then in debt, and ſo it doth now. No real difference as to this matter can be alledged, between this and the caſe * of * [502] two obligors; had there been a ſatisfaction given to the plaintiff for this duty, there would be an end. But that which I humbly inſiſt on is, that here is a duty certain; it is an action on *the right*, and not on *the tort*, and ſprings *ex contractu*, not *ex maleficio*; it is at leaſt

CLAYTON v. SWIFT.

quaſi contractus; and the agreements of the drawer and of the indorſer, are divers and diſtinct facts, and expreſs agreements; and the *aſſumpſits* which by conſtruction of law are raiſed upon theſe facts and agreements, are ſeveral and diſtinct, and are not to be compared to that caſe of *treſpaſs* and *trover*, for there they might be joined; here they cannot. Wherefore I do humbly hope, that until ſatisfaction, you will not exclude us from our remedy againſt any of thoſe that are chargeable to the payment of it: and therefore I pray judgment for the plaintiff.

Conſider the effect of every indorſement, it does two things.—FIRST, It aſſigns and transfers *the indorſer*'s right of action againſt *the drawer* to *the indorſee*.—SECONDLY, It creates an aſſignment from *the indorſer*, that *the indorſee* ſhall be ſatisfied: now in common ſenſe, can our recovering againſt *the drawer* without a ſatisfaction diſcharge that engagement? Suppoſe A. draw a bill payable to C. for twenty pounds, directed to me, and another draw another bill for the ſame ſum, payable to C. directed to me, and each ſay "the other's bill not being paid;" would a recovery againſt one without ſatisfaction be a bar for the other? Theſe are as ſeveral bills of exchange. Suppoſe a man have goods to ſell, and A. come to him and ſay, that "in conſideration you will ſell theſe goods to B. I will ſee you paid;" and I do accordingly ſell them to B. and afterwards ſue him for thoſe goods, and recover a judgment; will this recovery without ſatisfaction excuſe A. who aſſumed to ſee me paid? Or ſuppoſe two men do ſeverally promiſe ſo to me, and I ſue either, &c.? The forms of pleading in theſe caſes ſhew the neceſſity of ſatisfaction to make a good bar, for that in all ſuch actions it is neceſſary to aver non-payment. It was objected * by SIR JOHN HOLT, (ſee 3 *Cro.* 503. *Middlemore and Goodale*, 33 *Hen.* 6*t* 22. cited by *Sir John Holt*) that if we had brought our action firſt againſt *the indorſer*, then we might afterwards have brought an action againſt the firſt drawer, but that now we cannot, becauſe we have already ſaddled him with a judgment. I ſay *the drawer* is ſtill liable to be ſued by you, if you pay us, for he ſhall never take advantage of his own wrong, and it was his own fault not to pay, and then he might have had the advantage of ſuch payment; and a man may have two judgments againſt him for one and the ſame thing, and be liable to them both, through his own default; as in caſe of an executor who has twenty pounds aſſets, and he be ſued by two obligors at one time, and plead *plene adminiſtravit*, &c. both ſhall have judgment for that twenty pounds aſſets, and it is his own fault, for he might have paid it to one, and have pleaded that to the other.

* [503]

THE LORD CHIEF JUSTICE being abſent, HOLLOWAY and WRIGHT *Juſtices*, were for the defendant; and WYTHENS *Juſtice* coming in while they were delivering of their opinions, concurred.

And ſo judgment was given here for the defendant. But it was afterwards reverſed in the Exchequer Chamber.

The

The King *againſt* Bond.

Caſe 455

The ſeſſions cannot make an original order of removal.

Ante, caſe 461. Comb. 286. 2 Salk. 472. 479. 2 Burr. S.C. 276. 4 Term Rep. 71.

ORDER made at the quarter-ſeſſions for the county of *Surrey*, againſt the defendant, for removing him and his family (being poor) to *Clapham* pariſh, the place of his laſt ſettlement, unleſs he gave ſecurity to ſave *Mitcham* pariſh harmleſs.

The order being removed by *certiorari*,

I MOVED to quaſh it, becauſe by 13 & 14 *Car.* 2. c. 12. (now revived) any two juſtices near may remove, &c. And then there is A PROVISO, that if aggrieved we may appeal to the quarter-ſeſſions: now here *per ſaltum* they go to the ſeſſions, and make a concluſive order upon us, whereby we are ouſted of our appeal, which benefit the very ſtatute gave us. This is therefore naught, as well * as in the caſe of *baſtard-children*, which has been adjudged naught (*a*); and the proviſion in that caſe is in the ſame method as here, "by the "two next juſtices, and on appeal by the ſeſſions."

* [504]

AND IT WAS HELD that *the ſeſſions* could not originally make any order in it; and it was quaſhed on my motion PER CURIAM (*b*).

(*a*) But ſee Rex v. Clegg. Stra. 475. 8 Mod. 3.

(*b*) See Haine's caſe, Comb. 286. Rex v. Oſwell and Woking, 2 Salk. 472. Rex v. Amer, 2 Salk. 475. 479. Rex v. Leverington, 2 Burr. S.C. 276.

Hilary Term,

The Second and Third of James the Second,

IN

THE KING's BENCH.

Sir EDWARD HERBERT, *Knt. Chief Juſtice.*

Sir FRANCIS WYTHENS, *Knt.*
Sir RICHARD HOLLOWAY, *Knt.* } *Juſtices.*
Sir THOMAS POWELL, *Knt.*

Sir ROBERT SAWYER, *Knt. Attorney General.*

Sir THOMAS POWELL, *Knt. Solicitor General.*

Iſted *againſt* Clarke.

Caſe 456.

Miſnomer.
S.C. 1 Lutw. 894.
S.C. N. Lut. 275.
S.C. Comb. 40.

DEBT on a bond. The declaration was againſt SIR ROBERT CLARKE, on a bond, naming him *John*, and it was ſigned *Robert*.

After *non eſt factum* pleaded, there was a verdict, finding that the defendant *Sir Robert* ſealed and delivered the bond.

And judgment for the plaintiff. But this judgment was reverſed in the Exchequer Chamber. *Sed quære rationem* (*a*).

(*a*) LUTWICH reports, that the judgment was reverſed on the authority of the following caſes: Shotbolt's caſe, Dyer, 279. Field v. Winlow, Cro. Eliz. 897. Paxton v. Charles, Moor, 897. Watkins v. Oliver, Owen, 48. Cro. Jac. 558. Maly v. Shepherd, Cro. Jac. 640. and Sir Edw. Aſhley's caſe, 2 Brownl. 48.; and he ſays all theſe caſes are ſtrong, and direct to the purpoſe. S. C. 1 Lutw. 895.

The

Caſe 457. The King *againſt* The Mayor of Glouceſter.

Quære, If a return to a *mandamus* to reſtore a *town clerk* muſt be under the *common ſeal* of the CORPORATION.
S. C. 1 Roll Rep. 409.
S. C. 3 Bulſt. 189.
2 Kyd. on Corporations, 268.

MANDAMUS to reſtore *Mr. John Powel*, of the *Inner-Temple*, to the office of *town clerk* of *Glouceſter*.

It was moved to ſet aſide a return made thereto (on *Mr. Powel's* behalf) becauſe made by the mayor and ſix * of the aldermen, and their hands were ſet to it, whereas, it was urged, that it ought to be under THE COMMON SEAL, according to the reſolution in the *caſe of Cheſter*: nay, it was affirmed, that the mayor's own ſeal of mayoralty, or the ſtatute-ſeal for ſtatutes before him acknowledged, would not be ſufficient.

* [505]

But it was urged on the other ſide, that you cannot aver againſt the return, being made by the head of the corporation.

Quære of this point, for it was afterwards agreed, and he was reſtored, MONSIEUR PRICE of *Lincoln's-Inn* conſenting, as I was informed.

Caſe 458. Kingſton *againſt* Herbert.

A *ſcire facias* ought to go to all the *tertenants* before a COMMON RECOVERY is reverſed; but the granting the writ is not *ex neceſſitate juris*, but *diſcretionary* in the Court.
S. C. 3 Mod. 119.
S. C. Comb. 42.
Cro. Jac. 506.
Holt, 616.
10 Mod. 43. 125.
2 Ld. Ray. 1256.
Cruiſe on Recover. 290.
4 Bac. Abr. 418.
1 Burr. 361.

MOTION to ſet aſide a judgment of reverſal of a *common recovery* by this court on a writ of error brought here, becauſe there was no *ſcire facias* to the *tertenants*.

It was ſtrongly debated, and of all hands agreed to be very inconvenient, that it ſhould not be to the *tertenants*, becauſe otherwiſe a purchaſor might be deprived of his aſſurance, without notice; there was urged 28 *Edw.* 3. 20. *pl.* 70. *Dyer*, 320, 321. that the *tertenant* cannot be party to the writ of error; that they had a record exemplified of the reverſal; that the reverſal was long ſince, *viz.* in the thirty-fifth year of *Charles the Second*; that the want of ſuch *ſcire facias*, was either error in fact, or on record; that in truth it was diſcretionary in the court if they would award it; that none could be made parties to the writ of error, but thoſe that were parties to the action.

THE COURT upon this motion was of opinion, that awarding it to the *tertenants* was not *ex neceſſitate*, but diſcretionary (*a*).

(*a*) See the caſe of Hale v. Woodcock, 1 Burr. 360. Sheepſhanks v. Lucas, 1 Burr. 410. Cruiſe on Recoveries, 125. 289. and Lord Pembroke's caſe, Caſes temp. Holt, 614.

Lord

Lord Peterborough *againſt* Williams. Caſe 459.

SCANDALUM MAGNATUM on the ſtatute of 2 *Rich.* 2. *c.* 5. for publiſhing "*Dangerfield's Narrative:* the defendant pleads the ſame plea as he did to *the information in* the king's name (*a*); but a demurrer being thereto.

Qu. Whether a declaration of *ſcan. mag.* ſetting forth the pamphlet, with "*in quo quidem* "*libello diverſa* "*falſa et* "*ſcandaloſa* "*mendacia* are "contained," be ſufficient. S. C. Comb. 45.

IT WAS ARGUED, that * the declaration was ill, and that there was nothing of ſlander in it upon the plaintiff, for they had averred none, but only ſet forth the whole pamphlet with an *in quo quidem libello diverſa falſa et ſcandaloſa continentur*, and mention none in particular, which MR. POLLEXFEN urged to be naught.

And THE COURT doubted it.

* [506]

But the general opinion of THE BAR was, that ſuch their doubt was not on the point, but in favour to the defendant, to gain him time for a compromiſe; (it being thought that he had paid ſufficient before for that offence) for the manner of declaring ſeems good, and if upon the whole it appear to the Court there was any matter ſcandalous, the action lies, if otherwiſe not.

And it was afterwards agreed, as I was informed.

NOTE, In *ſcandalum magnatum* no coſts are to be given the plaintiff, though a verdict be for him.

No coſts in *ſcandalum magnatum*. Hullock on Coſts, 405

(*a*) See ante, 459. (471.)

Self *againſt* Kennicot. Caſe 460.

DEBT on a bond: the defendant pleads, that the plaintiff being indebted to J. S. he made *an attachment* of the ſaid money in his hands: the plaintiff demurs.

Foreign attachment pleaded.

Two exceptions are taken, becauſe,

FIRST, It does not appear that the debt aroſe within the juriſdiction.

SECONDLY, That the *attachment* pleaded was made before the money was payable by the bond.

It was anſwered as to THE FIRST, that there is a great difference where a man is plaintiff in an action, and the defendant here who is a third perſon, and no ways privy, and could not alledge that he who is plaintiff here was a defendant below; and the precedents are all without it, as may be ſeen in *Coke's Entries, tit. Debt.*

SELF v. KENSICOT.

And as to the other matter, it is *debitum in præſenti*, though *ſolvendum in futuro*; and it may be *attached* before it is payable, though it cannot be condemned until after; there was cited 1 *Sid.* 327. and 2 *Keb.* 202. *Halſe v. Walker*, 1 *Roll Abr.* 553. *Pell's caſe*, *Cro. Eliz.* 101.

* [507] * See *Mallum v. Herne*, *Mich.* 19 *Car.* 2. *B. R.* that an attachment in *London* of a debt in *Middleſex*, is good.

Caſe 461. Goring *againſt* Deering.

Manſlaughter pleaded. Ante, caſe 361. S.C. 3 Mod. 156. S. C. Carth. 16.

APPEAL of murder. The defendant pleads a conviction of manſlaughter, and that he was able and ready to read, demurrer (*a*).

S. C. Comb. 89. S. C. Trem. 15.

(*a*) See this caſe at large, 3 Mod. 156, 157. and the caſe of Siddens v. Jonſon, ante.

Caſe 462. Glynne *againſt* Nichols.

An action for diverting a watercourſe need not ſay for what it was uſed. S. C. Comb. 43. Vide ante, caſe 21. 196. 242. 355.

CASE for diverting of a water-courſe *in, per, et trans meſſuag.* The defendant pleads *not guilty*, and verdict for the plaintiff.

It was now excepted in arreſt of judgment, that he does not ſay for what uſe, whether family, cattle, or field; and if it was not uſeful where it run, it cannot be actionable to divert it (*a*).

(*a*) S. C. Comb. 43. ſays that it was adjudged for the plaintiff.

Caſe 463. Perkins *againſt* Titus.

A cuſtom of a manor that every tenant who ſhould be admitted to any copyhold eſtate, ſhould pay "ſo "much as the "lands or tene- "ments ſhall be "worth a year "at the time "of ſuch ad- "miſſion, and "not more," is a good cuſtom; for though it is uncertain what the value may be, yet it may be aſcertained by a jury.——S. C 3 Mod. 232. S. C. 3 Lev. 255. S. C. Comb. 3. S. C. Carth. 12. S. C. Skin. 247. S. C. Lilly's Ent. 371. Hob. 135. Prec. Chan. 568. 1 Stra. 654. 2 Stra. 1042. 3 Burr. 1717. 1 Bac. Abr. 480. Dougl. 730. *notis*. 2 Term Rep. 484.

ERROR on a judgment in the Common Pleas, where they held it a good cuſtom to pay for a fine upon admittance "*tantam* "*denarior. ſummam, quant. terræ vel tenement. illa valerent per ann.* "*tempore talis admiſſionis et non amplius.*"

MR. POLLEXFEN argued thus. I know not what it means; it is altogether uncertain whether the year before that in which the admiſſion was, or the year after, or that very year in which, or *communibus annis*, or what it ſhould be worth to be let at for twenty-one years, ſeven years, or one year; theſe may all be different; here is

an

an abſolute uncertainty; and therefore the cuſtom cannot be good: it may be they are ſown with corn, or be copſes, &c. A cuſtom ought to be in itſelf certain, *Davis's Rep.* 33. 73. Suppoſe a man ſhould preſcribe to have for toll the value of a pint of wheat, it would be uncertain, no man would tell what to make of it. See *Page's caſe* (*a*), and the *Biſhop of Bath's caſe* (*b*). PERKINS v. TITUS.

* SECONDLY, It is *admiſſus foret*, which cannot refer to time paſt, but only to what is to come. * [508]

THIRDLY, Here is a cuſtom alledged, that they who ſhall be admitted ought to pay the fine, but it is not ſhewn that any who have been admitted at any time ever paid it; whereas a cuſtom is upon times and acts paſt, as 22 *Edw.* 4. 8. *quod bene liceret*, and not ſaid *uſi fuer.* held ill.

LEVINZ *Serjeant*, *è contra*. If it may be reduced to a certainty, it is well enough; and that may be ſo here: if it be at the will of the lord they have no meaſure to compute it but by the value, for the books ſay two years for a death, and a year and an half for an alienation; as the land improves the fine improves: and the reaſon of this was founded on that care which the law has of preſerving the lord's intereſts, &c. (More was ſaid, which I could not hear.)

And afterwards on another argument THE JUDGMENT was affirmed, AND HELD, that the cuſtom was reaſonable and certain enough.

(*a*) Cro. Jac. 611. 671. (*b*) 6 Co. 35.

Pitt *againſt* Dockwra. Caſe 464.

DEBT on a bond of ſubmiſſion to an award, and judgment for the plaintiff. On a writ of error brought in the Exchequer-chamber, Amendment.

I INSISTED, that THE ROLL was *Eaſter Term* in the firſt year of *James the Second*. The MEMORANDUM of a bill *coram Carolo nuper rege*, which declares on a bond dated the fifth day of *November* in the thirty-ſixth year *dict. Caroli*, and the imparlance is to Eaſter term, *ante quem diem dictus Carolus obiit*; ſo here is a declaration of *Hilary Term*, in the thirty-ſixth year, &c. *nuper regis* of a fact done *tempore nuper regis*.

Whereupon they moved the court of King's Bench to amend the record that was here, in order to have *the tranſcript* amended in THE EXCHEQUER CHAMBER, and it was ordered accordingly.

Though I URGED, that what is matter of fact is not amendable, for that perhaps it may be true, as it is alledged: and all this proceeds from the inſtruction of the party, and the fact in truth was as they have declared: and it appearing they have commenced their * action * [509]

PITT v. DOCKWRA.

before there was cauſe for it, they cannot have judgment though after verdict, it being of their own ſhewing.

See the caſe of *Williams v. Bentkley*, *Moor* 598. *Dr. Bonham's caſe*, and *Turner's caſe*.

Eaſter

Eaſter Term,

The Third of James the Second,

IN

THE KING's BENCH.

Sir EDWARD HERBERT, *Knt. Chief Juſtice.*

Sir FRANCIS WYTHENS, *Knt.*
Sir RICHARD HOLLOWAY, *Knt.* } *Juſtices.*
Sir THOMAS POWELL, *Knt.*

Sir ROBERT SAWYER, *Knt. Attorney General.*
Sir THOMAS POWIS, *Knt. Solicitor General*

Evans *againſt* Crambington.

Caſe 465.

In an action by an *indorſee* againſt the *drawer* of a bill of exchange payable to A. *or order* for *the uſe* of B. the defendant cannot plead that B. was indebted to the king, and that monies to the amount of the bill was levied on *him*

CASE upon a bill of exchange, declares that the defendant drew a bill directed to one *Ryder*, payable to one *Price* or order, for the uſe of one *Calvert*; that this bill was indorſed to *the plaintiff*; that it had been accepted by *Ryder*, but not paid, whereby the defendant became chargeable.

The defendant pleads that *Price* was to have received it for *the uſe* of one *Calvert*, who was indebted to A. who was indebted to THE KING; that thereon there was *an extent*, and this money paid.

THOMPSON *for the plaintiff*, took two exceptions, that *Price* was the perſon to whom the bill was payable in law; that *Calvert* had no

under an *extent*.——S. C. 1 Shaw. 4. S. C. 2 Vent. 307. S. C. Carth. 5. S. C. Skin. 264. S. C. Holt 108. Ante, caſe 389. 400. 404. 426. 462.

title

EVANS v. CRAMBING-TON.

title in law to the money; that therefore the money could not be *extended* as his; and that this was a bill negotiated. SECONDLY, That this plea did but amount to the general iſſue, for it is no * anſwer to the action, but only to the conſideration.

* [510]

SIR THOMAS POWYS *for the defendant*. Their declaration is naught, *viz.* on a cuſtom, that any perſon having a bill, and then indorſing it, &c. and does not ſay he was *a merchant*; and to ſay *ſecundum conſuetud. mercator.* will not help it. SECONDLY, That the true property was in *Calvert*. 3 *Co.* 26. *Cro. Jac.* 687.

Adjournatur (*a*).

(*a*) This caſe was argued again in Eaſter term, and judgment given for *the plaintiff*. S. C. 1 Show. 5. A writ of error was brought on this judgment, which was argued in the Michaelmas term following, and the judgment was affirmed. S. C. Carth. 6. The principal error aſſigned was, that as the money was appointed to be paid to *Price* for *the uſe* of *Calvert*, the right and intereſt of the money was in *Calvert*, by whomſoever it might be received, and therefore it might be well in *the defendant* under the *extent* for the debt which *Calvert* owed to the king. But THE COURT held, that although the money was ordered to be paid to *the uſe of Calvert*, yet this was a hint, and gave him only an equitable title; that the right to the money was in *Price*; and his indorſement of the bill to *the plaintiff* transferred that right to *him* under the cuſtom of merchants; and thereupon the money demanded by the plaintiff was not extendable in the hands of the defendant. S. C. 2 Vent. 310; for it was not the money which the defendant promiſed to pay to *Price* for the uſe of *Calvert*, but another ſum due to the plaintiff for value paid to *Price*, in which *Calvert* was not concerned. Kyd on Bills, 70.

Caſe 466. Benſon *againſt* Offley and Lippon.

Appeal of murder, charging that A. gave the mortal wound, and that B. was preſent aiding and aſſiſting; a verdict finding that B. gave the wound, and that A. was preſent aiding and aſſiſting, is good.

S. C. Comb. 45. S. C. 3 Mod. 121. S. C. 3 Salk. 38. Ante, caſe 144. 168. 469. 9 Co. 67. 1 Salk. 334. 1 Ld. Ray. 21. 43. 2075. Caſes in Crown Law, 290.

APPEAL againſt two, A. as giving the ſtroke, and then B. as *præſens auxilians et abettans*, and ſo they murdered him: the verdict finds that B. gave the ſtroke, and that A. was abetting.

Argued to be well enough on the caſe in *Plowd.* 98. where in caſe of indictment it is held well enough.

E contra it was urged, that in every count or declaration the demand muſt be certain: the appeal is againſt three. Here is a verdict that finds that *Offley* did not ſtrike the ſtroke as is alledged in the declaration.

PER CURIAM. You can ſay nothing againſt this, but what may be ſaid againſt an indictment: here they are found guilty of the fact.

At laſt judgment was given for the plaintiff *niſi cauſa*, &c.

Gill Evid. 271. 1 Hale, 437. 2 Hale, 185. 292. 344. Dougl. 210. 4 Burn.

An appeal of murder where the blow is given in one county, and the death happens in another, may be tried by a jury of the county where the death happens.

AT ANOTHER DAY it was argued that the trial was wrong; for *the blow* being in one county, and *the death* in another, the trial ought to have been by a jury of both counties, and not in the county where

the

the death was: cited 3 *Hen.* 7. *pl.* 12. 4 *Hen.* 7. *pl.* 18. The 2 *Edw.* 6. *c.* 24. will not reach this caſe, there is nothing in this ſtatute that directs the trial otherwiſe than as the common law orde in this caſe. 3 *Inſt.* 24, 25, 26. 34.

Adjournatur (*a*).

(*a*) The words of the 2 & 3 Edw. 6. c. 24 ſ. 3. are, "that ſuch party, to whom "appeal of murder ſhall be given by law, "may commence, take, and ſue the ap- "peal in the county where the party ſhall "*die*, as well againſt the principal as ac- "ceſſary, in whatever county or place *the* "*acceſſary* ſhall be guilty of the ſame; and "that in ſuch appeal the juſtices ſhall pro- "ceed againſt *the acceſſary* in the ſame "county where the appeal was taken, as "if the offence had been done in the "ſame county;" but this clauſe is ſilent in the caſe of *an appeal*, with reſpect to the trial of the *principal*: but it enacts, "that "an *indictment* found by jurors of the "county where the death ſhall happen "ſhall be as good and effectual as if the "blow had been given in the county "where the party dies, or the indictment "is found." And THE COURT held, that there was no difference in this caſe between an *appeal* and an *indictment*. S. C. 3 Mod. 122. S. C. 3 Salk. 38.

* The King *againſt* William Dale.

Caſe 467.
* [511]

If the record of attainder againſt a perſon attainted in any county be removed by *certiorari* into the King's Bench, the COURT, on the priſoner being brought up by *habeas corpus*, may award his *execution* in that county in which the court ſits.
S. C. 3 Mod. 125. 128.
1 Sid. 72.
1 Lev. 61.
1 Keb. 244.
Poph. 131.
Hutton, 21.
2 Hale, 4.
Stra. 553.
Foſter, 140.
4 Burr. 2086.
2 Hawk. P. C. ch. 51.

THE DEFENDANT being a ſoldier, convicted and attainted, at *Reading* aſſizes laſt, of felony, in leaving the king's ſervice (*a*), was brought up by *habeas corpus* hither, and the record removed by *certiorari*.

MR. ATTORNEY moved to have a rule for the execution of him at *Plymouth*, which LORD HERBERT doubted; and thereupon ſpoke ſome paſſionate words to BURTON.

AND NOTE, the next day he was removed to the Common Pleas, and WRIGHT *Chief Juſtice*, removed hither.

On the *Tueſday* after a rule was made by WRIGHT *Chief Juſtice*, HOLLOWAY and POWEL *Juſtices*, for the ſoldier's execution at *Plymouth*, on the 16th of *May* following; and for ſo doing were cited theſe precedents, as I had them from SIR SAMUEL ASTREY.

In the thirty-fourth year of *Henry the Eighth*, *George Potter*, and others, were convicted and attainted of robbery in the court of King's Bench, and by a writ of execution, THE MARSHAL was commanded to deliver their bodies to the ſheriff of *Kent*, who was ordered to hang them in chains on *Shuter's Hill*.

In the forty-third year of *Elizabeth*, the Earls of *Eſſex*, *Southampton* and *Rutland*, tried before the LORD BUCKHURST, *Lord High Steward*, on an indictment in *London*, had judgment to be executed at *Tyburn* in *Middleſex*.

In the firſt year of *James the Firſt*, the *Lord Cobham* was indicted in *Middleſex* for treaſon, was tried before my LORD ELLES-

(*a*) See the ſtatutes 7 Hen. 7. c. 1; the 3 Hen. 8. c. 5; and 2 Edw. 6. c. 2. in 1 Hawk. P. C. ch. 48. ſ. 8. and 9.

THE KING v. DARE.

MERE at *Winchester*, and had judgment to be executed at *Winchester*.

In Michaelmas term, the sixteenth of *James the First*, *Sir Walter Raleigh* (*b*), who was attainted of treason, in the first year of *James the First*, before commissioners at *Winchester*, the record of attainder being certified into the King's Bench, he was brought to the bar, and execution was awarded to be done in *Middlesex*, and he was executed accordingly.

Cro. Car. 176.

In Michaelmas term, the fifth of *Charles the First*, *Cox* (*c*) being attainted at the sessions of the peace at *St. Albans*, for horse-stealing, the attainder removed by *certiorari*, and his body brought by *habeas corpus* into the King's Bench, where execution * was awarded to be done upon him by THE MARSHAL, who executed him in *Surrey*.

* [512]

In the seventh year of *Charles the First*, the *Lord Audley* was tried before my LORD COVENTRY for sodomy, upon an indictment in *Wilts*, and had judgment to be hanged in *Middlesex* at *Tyburn*.

2 Hawk. P. C. c. 6. § 4.

By the statute of 1 *Edw.* 6. *c.* 7. new justices of gaol-delivery may give judgment upon persons reprieved by former justices.

In Trinity term, the twenty-fifth of *Charles the Second*, *John Browne*, convicted of forcible marrying an heiress, was attainted in *Middlesex*, and executed in *Surrey*.

Hawley, (who with *Alborough* and others, had robbed the *Dutch mail* in *Essex* about a year since, of six thousand pounds in gold, belonging to some *London* Jews) was tried at this bar by an *Essex jury*, and was executed at *Tyburn*.

NOTE, Upon this occasion SIR FRANCIS WYTHENS was removed from being a judge, &c. and the next day came to WESTMINSTER HALL, and practised as *a Serjeant*.

(*b*) Cro. Jac. 495. (*c*) Cro. Car. 176.

Case 468. Hill, and another, *against* Shish.

If a trader be arrested on several actions, and give bail to them all, his not paying the debts in *six months* after such arrest and bail given, shall not make him a bankrupt until after the six months; for the 21 Jac. 1. c. 19. which enacts, "That if any person shall be "arrested, and shall not pay or compound for the same in *six months*, he shall be deemed and adjudged a "bankrupt," shall not relate to the time of the arrest.——S.C. Skin. 270. Ante, 253. 1 Salk. 109. 3 Lev 58. 1 Vent. 370. Skin. 22. 270. 2 Burr. 814. 2 Com. Dig. "Bankrupt," (C. 9.) Cooke's B. L. 3 edit. 118. 2 Term Rep. 141.

INDEBITATUS ASSUMPSIT for twenty pounds. On *non assumpsit* pleaded, a special verdict was found before the LORD CHIEF JUSTICE at *Guildhall*.

THE JURY find, that *Benjamin Hinton* was a goldsmith, and a trader as such in the city of *London*, for divers years before the tenth day of *January*, in the thirty-fourth year of *Charles the Second*; that therein he contracted divers debts, to the value of fifty thousand pounds; that he was indebted, by bond, to one *Capel* in four hun-

dred

dred pounds; that a *capias* was ſued thereon out of the Common Pleas, teſted the twelfth of *February*, in the thirty-fifth year of *Charles the Second*, returnable *quindena Paſchæ*; that after the *teſte*, and before the *return*, he was arreſted thereon, and ſpecial bail filed; that the twenty-ſixth day of *February* he was again arreſted; that *Sir John Moore* became bail for him, and gave a general ſecurity for him in all actions; that thoſe debts were not paid in ſix months; that the third of *March*, *Hinton* paid to the defendant twenty pounds. Then they find the ſtatute of 21 *Jac.* 1. *c.* 19. *prout:* and then they find the aſſignment by the commiſſioners to the plaintiff, *et ſi, &c.*

* The ſole queſtion in this verdict was, Whether *Benjamin Hinton* the banker, was a bankrupt at the time of the paying the twenty pounds, *viz.* the third of *March*, in the thirty-fifth year of *Charles the Second.* * [513]

For if he were ſo, then he had no capacity of paying this money to the defendant after an act of bankruptcy committed by him: for that by thoſe ſtatutes he had no power to diſpoſe of any part of his eſtate, but it was all come within the proviſion and care of the law, and as it were *in cuſtodia legis* for the benefit of all his creditors, ratably and equally, according to their ſeveral and reſpective debts; and it being ſo received, it continued part of this bankrupt's eſtate, and was well aſſigned by the commiſſioners to the plaintiffs; and of this there can be no queſtion, nor has there been any ſince the caſe of *Smith v. Milles* (*a*). So that the only point debatable is, whether here be ſufficient matter found to make *Hinton* a bankrupt on the third of *March?*

FIRST, Here can be no doubt but that he was a perſon capable of being ſo: it is found that he was a goldſmith and trader as ſuch, for divers years before the times mentioned in the verdict; that he ſought his livelihood by buying and ſelling in that trade; that he was indebted to the amount of fifty thouſand pounds, and the jury might have found it twice that ſum, and truly too: I agree all this makes him no bankrupt. But then the matter which makes the queſtion is this: he was arreſted at ſeveral men's ſuits, for ſeveral ſums above a hundred pounds, and he neither payed nor compounded the ſame in ſix months: and the queſtion is whether this with the other matter found ſhall make him a bankrupt from the time of ſuch his arreſt; for if he be a bankrupt from that time, then he was ſo on the third of *March*. Now that he ſhall be ſo, we have the expreſs words of the ſtatute, which the jury have found, 21 *Jac.* 1. *c.* 19. "That if "any take a protection, or prefer a bill or petition to compel his "creditors to accept a compoſition, or to give a further day of pay- "ment; or being arreſted for a hundred pounds then due, ſhall not "pay or compound the ſame in ſix months (*b*); or ſhall lie in priſon "for debt two months or more; or ſhall eſcape upon common or "hired bail, being impriſoned for debt; he ſhall be deemed and "adjudged a bankrupt to all intents * and purpoſes:" ſo that to do * [514]

(*a*) 2 Co. 98. (*b*) This act of bankruptcy is repealed by 10 Anne, c. 15.

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either of theſe five things makes him a bankrupt: then comes the clauſe that works the relation, "and thereby in the ſaid caſes of arreſt, or lying in priſon for ſuch debt and debts, or getting forth by common or hired bail," the bankruptcy is to commence from the time of ſuch firſt arreſt.

Now by the former clauſe or paragraph of the ſtatute, there are five acts of bankruptcy made which were not ſo before, *viz.*

FIRST, Taking a protection.

SECONDLY, Preferring a petition or bill for compoſition.

THIRDLY, Being arreſted for debt, and not paying it in ſix months.

FOURTHLY, Lying in priſon two months for debt.

FIFTHLY, Eſcaping upon common or hired bail.

And in the three laſt of theſe caſes, the law has by the other clauſe provided, that they ſhall be bankrupts from the firſt arreſt, *viz.* in the ſaid caſes of arreſt, or lying in priſon, or eſcaping upon common or hired bail, from the time of his or her ſaid firſt arreſt. Now my lord, that it muſt be ſo, I ſhall endeavour to prove it by arguing in ſhort theſe three things.

FIRST, That we are within the expreſs and direct letter of this law, and that the words of the ſtatute are with us.

SECONDLY, That this was the intent of the makers of this ſtatute, that it ſhould, &c.

THIRDLY, That it will break and overthrow almoſt all the rules of the law, for the interpretation of ſtatutes, to make that ſtrained, forced, and unnatural conſtruction, which they on the other ſide would have, and for which they can aſſign not one reaſon in the law. Now I would firſt obſerve, that *prima facie* the conſtruction is with the plaintiff, and this is the ſenſe of the collectors and abridgers of the law, as *Shepherd*, *&c.* and all the ſcribling tribe, they lay it down as a common place learning, that if a man become a bankrupt by arreſt or impriſonment, he ſhall be ſo from the firſt arreſt, by this ſtatute [515] of 21 *Jac.* 1. *c.* 19. I urge this, only to ſhew that this is the firſt * and moſt obvious conſtruction which the words afford.

But, SECONDLY, In the ſaid caſes of arreſt, or lying in priſon, or eſcaping on common or hired bail; the caſe of arreſt muſt be referred to that of arreſt and non-payment in ſix months; the caſe of lying in priſon, to that of lying in priſon two months or more for debt; the caſe of eſcape on common or hired bail, to that which is before enacted to make a man a bankrupt by doing ſo: and this conciſe way of expreſſion is ſurely as ſignificant as if the three particulars had been repeated again at large, or expreſſed in theſe words, *viz.* "If a man be arreſted for a juſt debt of one hundred pounds, and "pay it not in ſix months, he ſhall be a bankrupt from the firſt arreſt;

" reſt; if a man lie in priſon two months, he ſhall be a bankrupt " from the firſt arreſt; if a man eſcape on common or hired bail, he " ſhall be a bankrupt from the firſt arreſt;" this would ſurely have made it plain, and with ſubmiſſion, it is as plain in this ſhort conciſe explanatory clauſe: " and in the ſaid caſes of arreſt, &c." This certainly is the real meaning of the words, and no other tolerable ſenſe can be put upon them without a very great ſtrain; and the moſt curſory, as well as the moſt conſidering reader, will think ſo upon reading that ſtatute. In the ſaid caſe of arreſt, there is one relation to the foregoing clauſe; in lying in priſon, there is another relation; in getting out on common or hired bail, there is a third; and as it is in our printed ſtatute-book, there can really be no great doubt made of it. And though I muſt confeſs, that on the parliament-rolls, there are no commas, points, or colons; yet I think we need not the help of thoſe diſtinguiſhing marks in this caſe, to ſhew the ſenſe of thoſe words; for it is not ſaid " caſes of arreſt and lying in pri- " ſon," as they on the other ſide would have it; the firſt disjunctive " *or*" plainly diſtinguiſhes the caſe of arreſt from that of lying in priſon, as the next " *or*" diſtinguiſhes it from that of eſcaping on common or hired bail. * And theſe three particulars are expreſſed * [516] in the moſt ſignificant words uſed before, becauſe the arreſt in the firſt caſe is the act of bankruptcy; in the ſecond caſe the lying in priſon, and in the third caſe the eſcape, is the act of bankruptcy. And theſe three inſtances ſtand on different circumſtances, and make three diſtinct caſes: in the firſt, an arreſt without impriſonment, makes a bankrupt, with ſix months non-payment: in the ſecond, an impriſonment for two months makes the bankruptcy: in the third, the eſcape at any time after impriſonment on common or hired bail. Now theſe three are all, in ſhort, repeated in the rational clauſe, where it is ſaid, " caſes of arreſt; lying in priſon; or eſcape, &c." And I would fain know how theſe three particulars could be expreſſed in more pertinent and ſignificant terms in ſhort, than this is. But my lord, I think it will be needleſs to inſiſt any longer on this matter, for I ſuppoſe it will be agreed to me, that we are within the letter, though they ſay we are not within the meaning of the law, by reaſon of ſome pretended inconvenience, which they ſay will enſue, if the literal conſtruction be allowed. Now therefore to ſhew,

SECONDLY, That we are within the intent and meaning of this law. And here I would humbly obſerve to your lordſhip, that we are now in the caſe of a bankrupt, who in our law, is preſumed a cheat, according to the preſumption in the civil law, *eſt decoctor, ergo fraudator*; and this appears by the preambles of the ſeveral ſtatutes againſt bankrupts, which ſhew the meaning as well as the final cauſe of a ſtatute, and therefore are ſaid by COKE, to be a good key for the right underſtanding of a law. That of the 34 *Hen.* 8. *c.* 4. is, " That divers and ſundry perſons, craftily and ſubtilly obtaining into " their hands great ſubſtance of other men's, not minding to pay or " reſtore unto their creditors, but at their own wills and pleaſures, " do conſume ſuch ſubſtance obtained by credit, according to their " own pleaſures, againſt all equity and good conſcience." * The 13 * [517]

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Eliz. c. 7. recites the increase of bankrupts into great and excessive numbers. The 1 *Jac.* 1. *c.* 15. recites, "frauds and deceits to "increase amongst those that live by buying and selling, to the hinder-"ance of traffic and commerce, and to the general hurt of the kingdom, "by such as become bankrupts." And the 21 *Jac.* 1. *c.* 19. upon which this question depends, mentions "the increase of bankrupts, and "the inventions of frauds and deceits, for the avoiding and deluding of "the good laws in that behalf, then already made, and the remedies "by them provided." Now I would, upon these preambles, offer to your lordship,—First, That bankrupts were always thought and deemed by our law-makers, to be crafty, fraudulent, and deceitful persons, and therefore their acts ought all to be taken *in malam partem*. Secondly, That the mischief intended to be remedied by those laws are the cheats, knaveries, and frauds of such bankrupts. Thirdly, That the remedy intended and provided by these laws, is to make their estates liable to the payment of their debts equally to all their creditors, from the time of their becoming bankrupts; and in order thereto, to take it out of the bankrupts power to convey away, or dispose of any part of their estates from their creditors, by any act after the bankruptcy, or to prefer any one creditor before another, but that all his debts should be equally paid.* And it is observable, that in each general act, the description of a bankrupt is enlarged, which shews that the same were grounded on experience, and made purely of necessity; so that if the letter of the law were with them, and we were within the equitable, though farthest reach of the meaning of any of these laws, your lordship would help us by such construction as should advance the remedy, and suppress the mischief, and such as should relieve the creditors of such bankrupts. * Besides, it seems most plain, that this was the intention of the makers of this law, that a man arrested for a hundred pounds, and not paying it in six months, should be deemed a bankrupt from the first arrest; we have their words for it, which surely were designed to shew their meaning. But besides that, it seems worthy of your lordship's observation, that of all these five instances of bankruptcy made by this law, the three last, and no more, needed an explanation, from what time a person under these circumstances should be deemed a bankrupt. The first two are single, transient, instantaneous acts, as, "taking a "protection," or "preferring a petition," these two needed no explanation; for if they are bankrupts, it must be from the act done; but the last three cases I have named are complicated acts, things of time, continuance, and duration; and therefore our law-makers declare from what time they shall relate, and the party be deemed bankrupts. Now it would be very odd to imagine, that five new instances of bankruptcy should be made, and three of them needing an explanation, they should yet explain but two of these three. Besides, if it should be otherwise, the inconveniences would be infinite, and such an opportunity put into the bankrupt's hands, of cheating all mankind that have ever trusted him as it was certainly the intention of these laws to prevent. For suppose a person indebted in the sum of twenty thousand pounds, and in truth not worth above ten thousand pounds, which being all abroad, some of his creditors happen

* [518]

to

to arreſt him for their juſt debts, and he, not able to pay, knowing his own condition, and contriving how to get in his eſtate, and to defraud his creditors, acquaints a friend with his condition, and prevails with him to become his bail for the ſum he is arreſted for, he then obtains ſix months time to poſſeſs, conceal, ſecure, and diſpoſe of his eſtate; and then he is ready to diſcharge his bail by ſatisfaction, or rendering himſelf to priſon, as it ſhall ſuit beſt with his convenience, and ſo cheat all the reſt of his creditors; and * though his creditors ſhould certainly know his deſign, yet it would be impoſſible for them in the mean time to prevent his making away his eſtate; if they arreſt him there is bail, and he has ſix months time to play his tricks, and there is no way to prevent it but by the literal, and I think, intended proviſion of this law, in making him a bankrupt from the firſt arreſt. And this is not a foreign ſuppoſition, but has been of late the common practice of moſt trading perſons in a failing condition; *Thomſon*, *Temple*, and *Hinde*, as well as *Hinton*, have played the ſame game, and cheated their creditors by this device; and this is the very fact of the caſe at bar, and it is almoſt found ſo. For here the jury have found that *Hinton* was indebted in the ſum of fifty thouſand pounds, and amongſt others to the perſons named in the verdict, and arreſted at their ſuits for thoſe debts; that *Sir John Moore* became his bail, and further, that *Sir John Moore* gave a general note under his hand, ordering himſelf bail in all actions, the which, of itſelf, looks and carries the face of fraud; and the generality of it ſeems a demonſtration of fraud, for no man would be bail in all cauſes, but for ſome particular deſign; and the jury have alſo found, that *Hinton* was fifty thouſand pounds in debt at this time; a caſe that in all its circumſtances as it is on this verdict, was never before. So that, my Lord, on this verdict you cannot ſuppoſe *Hinton* at this time able, or viſibly able to have paid his debts; but this contrivance of his, with his friendly bail, has enabled him to cheat all the reſt of his creditors, except *Sir John Moore*, who was ſatisfied his debt, but no man elſe; which is a great inconvenience, and never to be avoided, if the words of this ſtatute ſhould be ſtrained to any other than their literal and real meaning. And this being a miſchief intended to be remedied, as any other that can be mentioned or aſſigned within this law, I hope there is no reaſon for any other conſtruction, eſpecially ſince.

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THIRDLY, The rules of law are with us too: this is undoubtedly a remedial law, and therefore to be extended * by equity, and not reſtrained as penal laws, which are ſo conſtrued in favour of life or liberty (*b*). This law has been conſtrued ſeveral times by equity for the relief of creditors, but never againſt the letter and creditors both; and if any conſtruction can be made more beneficial for the creditors one than another, your lordſhip will admit that conſtruction as founded on the beſt of rules, that of *ſuum cuique tribuere*, of giving to every man his own; and upon that foundation ſtand all theſe laws againſt bankrupts, and ſo it is reſolved in *March* 34. Beſides, no conſtruction is to be allowed of an act of

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(*b*) See Heydon's caſe, 3 Co.

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parliament, that will make any clauſe, ſentence, or word void, when another conſtruction will make it all ſignificant together; all the parts, clauſes, and words of a ſtatute, ought, if poſſible, to have ſome meaning: now here in this caſe the word "*arreſt*" will be void, if you judge it otherwiſe than I hope; for then the bare words, "*lying* "*in priſon*," will do it. This is an act of explanation, and this very clauſe is explanatory, and therefore admits not ſo eaſily of any intendment or equitable conſtruction, but ought to be conſtrued according to the words; for there ought not to be an explanation upon an explanation to prevent infinity of doubting; and therefore I hope you will not reſtrain it (*c*). Beſides, my lord, when a law by expreſs proviſion enacts how conſtruction ſhall be made, ſuch clauſe ſo directive of conſtruction is of the ſame force, and has the ſame authority as any other clauſe in ſuch law: it is moſt true, your lordſhip have a liberty of interpreting a law, according to the particular exigence of the caſe in queſtion; but when the ſame law directs how ſuch interpretation ſhall be made, then I am ſure your lordſhip will be ſo far influenced by that direction, as not eaſily to make any other conſtruction, without ſome great, important, and unanſwerable reaſon to the contrary, none of which can be ſhewn in this caſe. * Now here this ſtatute directs an interpretation beneficial in favour of creditors, and ſtrict upon the bankrupt and his acts; ſuch as the payment of money, or conveyance of his eſtate, or the like: now, my lord, either this caſe is plain or it is doubtful; if plain, then I am ſure by the words it is with us; if doubtful in conſtruction, then the law directs ſuch conſtruction in favour of my clients who are creditors. Beſides, ſuppoſing this conſtruction agreeable to the intent, then ſure I am it is a rule, that no ſtatute ſhall be reſtrained againſt the letter and intent both, be the conſequence never ſo inconvenient; for that overthrows and abſolutely ſubverts the uſe and deſign of ſuch law. *Corbet's caſe*, 2 *And.* 249. And it is the parliament that muſt remedy ſuch inconveniencies, not this court. I might ſpend a great deal of your lordſhip's time, in citing abundance of caſes where ſtatutes ſhall be reſtrained, and where extended; but I think it needleſs to trouble your lordſhip with any, ſince that in queſtion is undoubtedly a remedial law; and the cheats of bankrupts were the miſchiefs intended to be remedied, and here is one that I have named which cannot be helped but by the aid of this ſtatute, and therefore ought to be conſtrued within the intent, eſpecially ſince there is no great, or any conſiderable reaſon given to the contrary: for the only material objection is, the inconvenience in caſe this conſtruction be allowed, which they ſay is great, (but not ſo great as is pretended) as that if a trading perſon be arreſted and bailed, and a third perſon who knows nothing of it, intruſts him or deals with him, that if ſuch a perſon ſhould be a bankrupt from the firſt arreſt, that then every perſon ſo dealing with him, would be forced to return the goods, and yet loſe the money he paid for them, which they ſay would be ſo great a miſchief, that it would diſcourage trade. To this I ſay,

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(*c*) Cro. Car. 34. Stiles, 467. Uppam v. Hide, Dyer, 150. Butler v. Baker, 3 Co.

the

the same thing may happen in many cases every day, where I buy goods of a man that has no property; but besides, most of * these are provided for by 1 *Jac.* 1. *c.* 15. being within the equity of that "PROVISO, that no debtor of the bankrupt be endangered for the "payment of his debt truly and *bona fide* to any such bankrupt, be-"fore such time, that he shall know that he is become a bankrupt;" *i. e.* all persons paying money to, or buying goods of a bankrupt, being to be received within the equity of that proviso, if they know him not to be such.

HILL v. SHISH. * [522]

As to the objection for such lands of a trader, I answer, that mischief does not immediately concern trade, for he who purchases lands of a goldsmith, may be said to have notice, or at least a suspicion of his intended bankruptcy; and he deals not with him in that matter as a trader, but as a landholder, and buys the land at his peril, subject to all such incumbrances as lands are liable to, which are innumerable; therefore *caveat emptor*. Now on the one hand, by an equitable construction of the law, according to that proviso in the cases mentioned, all or most of the mischiefs supposed to arise by adjudging any person a bankrupt from the time of his first arrest, though he put in bail, will be accommodated. On the other hand, it is impossible to prevent a bankrupt from gaining time to get in his estate and to defraud his creditors, without adjudging him a bankrupt from the time of his first arrest. But were the consequence worse than is pretended, here is an act of parliament, to which every man's consent is supposed to be given, as well to come as present; and so it can do no injury, as is said in *Hob.* 256. And there are hundreds of rules in the law, which may bring as great hardship upon some men, as possibly can be pretended in this case, and yet are allowed; as the statute of inrolment of deeds, which by relation avoids mean acts done in the six months, &c; that which I contend for is no more. I could muster up a great many cases where a man shall part with that which he has once lawfully obtained; as when he purchases of the king's accountant; so where he shall pay again that which he * has already paid; as when he pays rent to a *feme covert*, though he knows her not to be such (*d*). But besides all these, there are several other acts of bankruptcy which are agreed and allowed to be such, and yet for some time after, the bankrupt may continue his trade, and seem in good credit, he may keep his shop, and walk the Exchange notwithstanding; as for instance, he may conceal himself to avoid the payment of a particular sum, his servants may deny him at home, and pretend him gone into the country, and yet he may trade in his shop; after this, some time before his condition be known, he may make a fraudulent conveyance of his estate to defraud his creditors; this will make him a bankrupt, and yet he may possibly trade with credit for some months, until his estate be discovered. In the case of *Heylor v. Hall* (*e*), it is resolved, that if a trader in debt conceal himself in his house for a day, or an hour, for to delay or to defraud his creditors, this makes him a bankrupt

* [523]

(*d*) Dutton v. Tracy, Cro. Jac.

(*e*) Palm. 325.

within

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within the ſtatute, and yet his other correſpondents may no more know of that than of this. And in *Bludworth's caſe* (*f*), GLYNNE ſaid, that once a bankrupt and ever a bankrupt. In all theſe caſes the miſchief to ſome is as great, and may be greater than can be pretended in judging him a bankrupt from the firſt arreſt, even when he puts in bail, eſpecially in the manner as this verdict has found it. All the inconveniences and miſchiefs which they can pretend may enſue on this conſtruction, will enſue on theirs; for after the ſix months he may as well as before trade and traffic, and none of his correſpondents know it, but he that arreſted him, and he would no more truſt him before than after, for otherwiſe he would not have arreſted him, but as to others it may be the ſame thing; and notwithſtanding that inconvenience, they agree him a bankrupt after the ſix months. The caſe of *Duncomb v. Walter* (*g*) is objected,

* [524] * that this queſtion was never argued in WESTMINSTER HALL but in that one caſe, and that was on *Staley* the goldſmith's bankruptcy; but as I remember, I will not be poſitive, the main point there was, concerning an executor's right to an action before probate; and the reaſon of that judgment was chiefly, becauſe the arreſt of the party bankrupt was at the ſuit of the executor, before he had proved his teſtator's will; and that ſo found on a ſpecial verdict: and as to the other point, my LORD NORTH was, as I am informed, of opinion clearly with the plaintiff; but however that be, that is but one ſingle caſe, and the inconvenience of it is manifeſt ſince, in the frequent cheats of bankrupts in this particular. Beſides, every caſe ſtands on its own bottom, and has its own circumſtances; here it is found ſo that it cannot but be preſumed, that the bail was *ex intentione ad defraudand'*: *Hinton* was indebted in £. 55,000. which *Staley* was not, of which moſt men muſt be conuſant; here are a great many arreſts; there was but one. Theſe are things of a public notice, whereas notice of an original may be privately given; and therefore not the ſame reaſon for our law-makers to make a relational bankruptcy in the one as in the other: here is a general, univerſal, and indefinite order for being bail to all actions, which was not there: here is no finding that he was in viſible credit on the third of *March*, and why ſhould it be ſo preſumed I know not, ſince in law as well as philoſophy, *de non entibus et non apparentibus eadem eſt ratio*. So that whatſoever hardſhip it may be on ſome, it can be none on the defendant, *Hinton* being under theſe ill circumſtances at this time, and theſe notorious ones too; things that in their own nature needed no particular notice. Here is a banker in *London* indebted £. 55,000, arreſted by writ out of the King's Bench, arreſted by writ out of the Common Pleas, arreſted on plaints levied in the ſheriff's court, and all this upon bonds for money lent and unpaid, and in the ſame place where the de-

* [525] fendant lives. * There is as much reaſon to ſay the ſecond particular, where it is ſaid, "or eſcape," ſhould be copulative as in our caſe; and then the bankruptcy from the arreſt ſhall be but in one caſe, and in the ſaid caſe of arreſt and lying in priſon, and eſcaping on common or hired bail, and in no other caſe whatſoever. So that

(*f*) 1 Sid. 115. (*g*) Ante, caſe 269.

none

none ſhall be a bankrupt from the firſt arreſt, but he who eſcapes upon common or hired bail; and when the ſtatute ſays three caſes, it muſt be meant only one caſe; there is as much reaſon for that as for the other conſtruction. It is true, here is no fraud nor purpoſe of being a bankrupt found; nor is there need of any ſuch finding, for we ſay the act of parliament makes him ſuch *ab initio*. It is true, *argumentum ab inconvenienti* is ſtrong, but not concluſive, eſpecially againſt the expreſs letter of the law; and when a miſchief may be, nay, actually is on the other ſide, all ſtatutes made againſt fraud, ſhall have a favourable expoſition in order to help the party, as *Twyne's caſe* (*b*).

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MR. THOMPSON argued *è contra*, from the inconveniences, and the *caſe of Staley*.

WRIGHT *Chief Juſtice*, and the reſt of the Court, delivered their opinions for the defendant, without having that due conſideration of the caſe as it deſerved, as I thought. *Ideo mihi reſtat dubitandum.*

(*b*) 2 Co. 80.

The King *againſt* Sellers. Caſe 469.

Indictment for refuſing to be of the ward-mote-inqueſt. S.C. 3 Mod. 16;

INDICTMENT at the general quarter-ſeſſions held at *Guild-hall* for the city of *London*, *quod* MICH. SELLERS *nuper de paroch. S. Butolphi extra Aldgate in warda de Portſoaken infra civit. de Lond. præd. coquus* 21 *die Dec.* 2 *Jac.* 2. *ac diu antea ac ſemper poſtea uſque diem caption. hujus inquiſition. fuit inhabit. et reſidens in paroch. et ward. præd. quodq; idem Mich. dicto* 21° *die Dec. anno ſuprad. in cur. de le wardmote tunc tent. pro warda præd. infra paroch. et ward. præd. legitime et debito modo fuit electus in officium unius jurat.* • *cur. de le wardmote præd.* ANGLICE, one of the wardmote-inqueſt *pro warda præd. pro uno anno prox. ſequen. ad inquirend. et præſentand. ſeparal. offenſ. adtunc commiſſ. et committend. infra ward. præd. pro bono publico unde præd. M. S. poſtea ſcil. dict.* 21 *die Dec. anno ſuprad. apud par. et ward. præd. habuit noticiam præd. tamen M. S. debit. officium ſuum in hac parte parvi pendens ſed machinans et intendens debitam execution. officii ſui præd. quantum in ſe fuit totaliter impedire et retardare a præd.* 21 *die Dec. anno ſuprad. uſque diem captionis hujus inquiſitionis apud par. et ward. ſuprad. officium unius jurator. cur. de le wardmote præd. ſuper ſe ſuſcipere et exequi voluntariè obſtinatè et contemptuosè penitus recuſavit et denegavit contra debit. ſuum præd. in mal. exemplum omnium alior. in tali conſimili caſu delinquentium ac contra pacem dict. domini regis nunc coron. et dignitat. ſuam, &c.*

• [526]

Which indictment being removed into this court by *certiorari*,

Removed by *certiorari*.

The defendant pleaded, That *dictus dominus rex nunc per literas ſuas patentes ſub magno ſigillo Angliæ ſigillat. geren. dat. apud. Weſtm. in com. Midd.* 7° *die Maii anno* 1° *recitand. quod magiſter gubernatores et communitas myſterii coquorum civitat. London præd. ſurſum reddiderunt*

Plea. The king's gran not to be put o any inqueſt.

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reddiderunt eis ſuas poteſtates franchef. libertates privileg. ac autheritat. de vel concernen. election. nomination. conſtitution. exiſten. vel appunctuat. alicujus perſonæ ſive perſonar. in ſeparal. officium magiſtr. guardian. aſſiſten. ſive cleri ſocietat. præd. quam quidem ſurſum reddi-tionem idem dominus rex acceptaſſet int. al. de gra. ſua ſpecial. certa ſcientia et mero motu ſuis conceſſit præd. magiſtro vel gubernatoribus et commun. myſterii coquor. civitat. London. præd. quod ipſi et omnes homines ejuſdem myſterii dict. civitat. forent jure et nomine unum corpus et una communitas perpetua, et quod iidem magiſtri et gubernatores et communitas haberent perpet. ſucceſſion. et unum commune ſigill. ad ſerviend. negotiis ejuſdem communitat. in perpetuum, et poteſtatem frangendi alterandi et mutandi idem, &c. Et ulterius quod nec præd. magiſtri vel gubernatores et communitas ejuſdem myſterii coquor. nec ſucceſſores ſui nec aliquis eorundem per aliqua media extunc in poſterum infra civitat. London vel ſuburb. ANGLICE ſuburbs *ejuſdem ſummoniti vel poſiti eſſent ſuper aliqua negotia jurat. inquiſition. attinct. vel ad recognition. capiend. aſſignat. coram major. et vicecom. vel coronator. dict. civitat. pro tempore exiſten. nec ſummoniti eſſent per aliquem * officiarium vel officiarios vel miniſtros licet hujuſmodi jurat. ſive inquiſitio ſummonit. eſſet virtute alicujus brevis ſive brevium. dict. domini regis hæredum vel ſucceſſor. ſuorum ſed quod ipſi magiſtri ſive gubernatores et communitas myſterii præd. et ſucceſſores ſui et quilibet eorum verſus dict. dominum regem hæredes et ſucceſſores ſuos et verſus major. et vicecom. dict. civitat. pro tempore exiſten. et omnes officiarios et miniſtros quoſcunque acquietarentur et exonerarentur prout per eaſdem litteras paten. hic in cur. prolat. et cur. hic nunc oſtenſ. plenius int. al. liquet et apparet; idemque M. S. ulterius dicit quod idem M. præd. 21° die Dec. anno ſecundo ſuprad. in indictament. præd. ſuperius mentionat. et per duos menſes ante tunc ult. elapſos fuit coquus infra civitat. London præd. et membrum et liber homo* ANGLICE freeman *de ſocietat. coquorum præd. exiſtens in eandem ſocietat. debito modo diu antea admiſſus et continue poſtea hucuſque fuit et adtunc eſt membrum et liber homo ſocietat. præd. apud London præd. in par. et warda præd. quodque præd. 21 die Decembris anno ſecundo ſuprad. et abinde hucuſque fuerunt ſufficientes homines reſidentes et inhabitantes in warda præd. ultra et præter coquos ſocietat. præd. ibidem reſident. habiles ad exercend. officium jurator. cur. de le wardmote præd. pro warda præd. pro anno tunc proxim. ſequen. in indictament. præd. mentionat. Et hoc parat. eſt verificare unde petit judic. & ipſe idem M. S. ulterius occaſione præmiſſ. impeti ſeu inquietari debet et quod ipſe de præmiſſis per cur. hic dimittatur.*

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And to this there is a demurrer.

MR. SERJEANT HOLT argued, That this grant will not create an exemption from being a juror in criminal caſes where the king is a party, becauſe it wants the clauſe, *licet nos vel coronam noſtram tangent*, and cited for that, 42 *Aſſiz. pl.* 5. MAGNA CHARTA, *cap.* 35. 2 *Inſt.* 130. That of the coroner cannot include it, for he has other inquests beſides that of criminal ones *ſuper viſum corporis*; as in caſe of a challenge to the ſheriff, and then he is to return the *venire*. As to the words of diſcharge againſt the king, that may be of iſſues only. Beſides, we ought to have pleaded his exemption when he was charged at the wardmote.

I ARGUED

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I ARGUED *è contra*, That here were words ſufficient, for it is *licet ſummonit. eſſet virtute al'*, &c. and that they ſhould * be diſcharged againſt the king, it is plainly implied in all criminal cauſes; and we have pleaded that there was a ſufficient number beſides, *Roll. Abr. tit. Prerogat.* 198. 3 *Edw.* 1. *Rot. Clauſo.* Grant, that J. S. ſhall be free from ſummons before juſtices itinerant. 8 *Edw.* 1. *Rot. pat. mem.* 4. ſhall be diſcharged of all ſummons before juſtices itinerant, is intended as well for common pleas, as *placita foreſtæ*, though *prima facie* it extends only to *placita foreſtæ*; and if in that caſe it was ſo conſtrued, why not generally here? Nay, they cannot contend it to be a void grant if there are words enough to import it, and jurors ſufficient beſides to diſcharge the office. * [528]

But whatever our plea be, their indictment is naught, for it is not ſaid when the duty is to be performed, nor whether any thing be to be done therein, between the twenty-firſt of *December*, and the taking of the indictment; it does not ſay that the oath was tendered to him; and though perhaps an indictment may lie before the year be expired, yet then there muſt be ſome part of the duty to be performed neglected, and ſhewn to be ſo; it does not ſay that he was preſent at any court, or that he was ſummoned to be at any court.

And upon this we had judgment for the defendant, *quia indictament. fuit minus ſufficiens in lege.*

Wherefore there was afterwards another indictment framed by MR. POLLEXFEN's advice, VIZ. *Quod infra wardam de* PORTSOAKEN *infra civitat.* LONDON *eſt, et a tempore cujus contrarii memoria hominum non exiſt. fuit, quædam cur. viſus franci plegii ſive wardmot.* ANGLICE wardmote *quolibet anno in et ſuper feſtum Sancti Thomæ Apoſtoli coram aldermanno wardæ præd. pro tempore exiſten. tent. et tenend. in qua quidem cur. ſecundum conſuetud. infra ward. præd. per totum tempus præd. uſitat. et approbat.* VIZ. *apud parochiam Sancti Butolphi extra Aldgate infra civitat. et ward. præd. inhabitant. et reſident. pro tempore exiſten. infra ward. præd. tenentur ratione reſidentiæ ſuæ comparere et ſectam ſuam facere et quando adinde elect. ſervire ſuper jurat.* ANGLICE inqueſt *in cur. præd. ſecundum conſuetud. per totum tempus præd.* VIZ. *apud paroch. præd. uſitat. jurat. et onerat. ad præſentand. ea quæ in cur. præd. ſunt præſentabil. quodque * M. S. nuper de præd. paroch.* SANCTI BUTTOLPHI *extra* ALDGATE *in warda de* PORTSOAKEN *præd coquus* 21° *die Dec. anno*, &c. *ſecundo ac diu antea et ſemper poſtea uſque diem captionis hujus inquiſitionis fuit inhabitans et reſidens in par. et warda præd. quodque ad cur. viſus franci pleg. ſive wardmoti tent. pro Warda præd. dicto* 21° *die Dec. anno nunc ſecundo ſuprad. exiſten. feſto Sancti* THOMÆ APOSTOLI *infra par.* SANCTI BUTTOLPHI *extra* ALDGATE *in warda præd. coram* JACOBO SMITH *mil. tunc aldermanno wardæ præd. idem M. S. exiſten. debito modo electus,* VIZ. *apud paroch. prædict. unus jurator. cur. viſ. franci pleg. ſive wardmoti præd.* ANGLICE, one of the wardmote inqueſt, *pro warda* * [529

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warda præd. ad inquirend. et præſentand. ſeparal. offenſ. commiſſ. et committend. infra wardam præd. pro bono publico quæ juriſdictioni cur. viſus franci pleg. pertinent inquiri et præſentari unde præd. M. S. poſtea ſcilicet eodem 21° die Dec. apud par. et ward. præd. habuit notic. et ad eandem cur. adtunc et ibidem fuit præſens, præd. tamen M. S. debitum ſuum in hac parte parvi pendens, ſed machinans et intendens negot. dict. cur. præd. quantum in ſe fuit totalit. impedire et retardare præd. 21° die Dec. anno ſuprad. apud par. et wardam præd. recipere ſacrament. unius jurator. cur. viſus franci pleg. ſive wardmot. præd. voluntarie obſtinate et contemptuoſe penitus recuſavit et denegavit contra debit. ſuum præd. in malum exemplum omnium alior. in conſimili caſu delinquentium, ac contra pacem dicti domini regis coron. et dignit. ſuas, &c.

And upon the finding of the indictment, the defendant ſubmitted, contrary to the perſuaſion of the company; and ſo this matter was never judicially determined.

A TABLE

A

TABLE

OF THE

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4. An action on the caſe, in the nature of conſpiracy, for a malicious proſecution, will lie againſt one perſon only, although *the bill* of indictment was not found: but the declaration muſt ſhew that the proſecution is determined — — 51

5. So an action for a malicious proſecution will lie, although the defendant be acquitted upon a defect in the indictment — — 51, *notis.*

6. An action on the caſe lies againſt *a common carrier* for the loſs of goods delivered to him to carry, although no particular ſum be agreed on as the price of the carriage — 81

7. An action on the caſe will lie againſt *a ſtage-coachman* for an injury done to the *perſons* or the *properties* of his paſſengers, for he is in thoſe reſpects a *common carrier* — — 128

8. *Quære*, if a *leaſe* be made of *a houſe* to an *alien artificer*, which is void by the ſtatute 32 Hen. 8. c. 6. the leſſor can have an action for the *uſe and occupation* — — 135

9. An action on the caſe for diverting a watercourſe is good, with *a debet et ſolet currere* only, for being againſt *a wrong doer*, a poſſeſſion is ſufficient — — 243

10. An action lies for a malicious proſecution by *information* as well as *indictment* — — 295

11. In an action on the caſe againſt ſeveral defendants for a malicious proſecution, if the jury find them all guilty, and aſſeſs fifty pounds damages on one, and a thouſand pounds damages on the other, the plaintiffs may enter a *nolle proſequi* as to the one, and take judgment for the other 469

12. An action on the caſe will lie againſt *all the owners* of a ſhip to *the maſter* of which goods were delivered to be carried on freight, and were damaged during the voyage - 478

13. An action for diverting a watercourſe running *in*, *by*, and *acroſs* the land, &c. muſt ſtate for what purpoſes the water was uſed — 507.

14. An action lies againſt an adminiſtrator, although there be a ſuit depending in the eccleſiaſtical court, on the queſtion, Whether the party died *teſtate* or *inteſtate*, for until the letters of adminiſtration be revoked, he ſhall be conſidered as the perſonal repreſentative of the deceaſed — 69

ADDITION.

1. In an indictment for a reſcous, if the defendant be deſcribed by the addition of "*wife of J. S.*" without giving J. S. his proper addition, it is bad — — 84

ADMINISTRATOR.

1. An adminiſtrator is the legal perſonal repreſentative of the deceaſed, until the letters of adminiſtration be revoked, and he is therefore liable to an action, although there is a ſuit depending in the eccleſiaſtical court, tending to eſtabliſh *a will* made by the deceaſed — — 69

2. If a ſon die inteſtate in the life-time of his father, and the *father* refuſe to adminiſter, and, upon ſuch refuſal, letters of adminiſtration are granted to a *brother* of the inteſtate, a ſurviving *ſiſter* ſhall have diſtribution 285

3. An adminiſtrator *durante minoritate* may retain aſſets to pay a bond given by the inteſtate to truſtees conditioned to pay the adminiſtratrix ſo much, if ſhe ſurvived him — 403

4. A declaration as adminiſtratrix of the goods of *Adam*, ſtating that *Adam* died

died inteſtate *ut dicitur*, is good; for *ut dicitur* may be rejected as ſurpluſage — — 404

5. If a man die inteſtate, leaving no wife, and only one child, a ſon, who obtains letters of adminiſtration to his father, and then dies inteſtate, under age, and letters of adminiſtration *de bonis non* of the father are then granted to the next of kin of the ſon, the court will not prohibit the commons from revoking the letters, and granting ſuch adminiſtration to the next of kin of the father — — 408

6. The father ſhall have adminiſtration of his ſon's goods, in preference to the ſiſter — — 307

7. If an inteſtate leave two ſons, and one of them die inteſtate, his ſhare of the father's eſtate ſhall go to his adminiſtrator, and not to the adminiſtrator of the father — 486

8. If an adminiſtrator commit *devaſtment*, and dies inteſtate pending an action of debt on bond, and a *ſcire facias* be brought on the ſtatute 17 Car. 2. c. 8. againſt his adminiſtrator, the adminiſtrator may plead *plene adminiſtravit* — 485

ADMIRALTY.

1. If a ſhip chandler furniſh ſails to a ſhip while ſhe is lying in port, and afterwards the owners ſell her, the ſhip chandler cannot libel in the Admiralty court againſt the ſhip and her new owners for the value of thoſe ſails — — 338

2. All the mariners of a ſhip may join in a ſuit in the Admiralty court againſt the maſter; but if the maſter and the mariner join in a ſuit againſt the owner in that court, a prohibition lies — — 86

3. The court of King's Bench will not prohibit the court of Admiralty from ſtopping a ſhip from going to the Eaſt Indies, provided there be no libel inſtituted, but only a proceeding by the king's advocate, purſuant to an order of council — 303

4. If a perſon libel in the court of Admiralty, *he* ſhall not, after the cauſe has had a whole year's tranſaction, be allowed to ſtop its progreſs by ſuggeſting to the court of King's Bench that the libel was founded on the conſtruction of *letters patent*, which juriſdiction belongs excluſively to the common law courts.—*Sed quære*, for any perſon, as *amicus curiæ*, may ſhew the uſurpation of an inferior court - 406

5. The court of King's Bench will take notice, not only of the ſentences of the court of Admiralty in England, but of thoſe of the courts of Admiralty abroad, whether within the dominions of the crown of Great Britain, or belonging to foreign ſtates — — 232

6. The ſentence of a foreign court of Admiralty, decreeing a ſhip to be a *lawful prize*, is concluſive; and therefore, although the ſhip taken belonged to a *neutral power*, the owner cannot recover her back by an action of trover brought againſt the vendee, under the ſentence of the Admiralty — — 232

7. But a ſentence in a court of Admiralty is not concluſive, where it appears upon the face of it to be contradictory to itſelf, or manifeſtly repugnant to the eſtabliſhed principles of law and juſtice - 233, *notis.*

8. Nor is a ſentence of condemnation in a foreign court of Admiralty concluſive evidence that a ſhip was not neutral, unleſs it appears by the proceedings, that the condemnation went upon that ground 233, *notis.*

ALE-HOUSES.

1. An indictment will not lie on the ſtatute of 5 & 6 of Edw. 6. c. 25. for keeping an alehouſe without a licence — — 457

2. At common law, no *licence* was required

quired for the keeping of an alehouſe — — 457

3. The reaſon why an indictment will not lie on the above ſtatute, may be ſeen in the caſe of Rex v. Marriot, 1 Shower, 400. — 402, *notis.*

ALIEN ARTIFICERS.

1. By 32 Hen. 8. c. 16. ſ. 13. "all "leaſes of any dwelling houſe, or "ſhop, made to any ſtranger, arti- "ficer, or handicraftman, born a- "broad, not being a denizen, ſhall "be void; and no ſuch perſon ſhall "take any leaſe of any dwelling- "houſe or ſhop within this realm, "or in any other of the king's do- "minions, upon penalty of five "pounds; and no perſon ſhall grant "or let to farm any dwelling houſe "or ſhop to any ſuch ſtranger, arti- "ficer, or handicraftman, not being "a denizen, to the intent to dwell "or inhabit the ſame, upon the like "pain of five pounds" — 135

2. If an alien artificer inhabit a houſe under a leaſe granted to him for a year, the leſſor cannot have an action for the *uſe and occupation*, notwithſtanding the ſtatute renders the leaſe void, for this would, in ſome degree, evade the intention of the legiſlature — — 135

3. But if a landlord let a houſe by parol, from year to year, at a certain rent, an action will lie for uſe and occupation — — 135

4. But if a houſe be let by ſuch *a contract*, as in conſtruction of law amounts to *a leaſe*, it will be void by the ſtatute — — 135

5. In debt for rent on a leaſe of a houſe, brought againſt the adminiſtrator of the leſſee, the defendant, after *oyer* of the indenture, may plead the ſtatute 32 Hen. 8. c. 16. ſ. 13. and alledge that the inteſtate, at the time of the ſaid demiſe, was a ſtranger and an alien artificer, born, &c. and ſo the leaſe void; for this plea was agreed by all the court and counſel to be good law — 136

ALIMONY.

1. Decrees in Chancery for *alimony* were firſt introduced during the time of Charles the Firſt; for there being no civil law courts open during the civil wars, married women were allowed to ſue in the court of Chancery — 282, 283

2. And the decrees therein made were afterwards confirmed by the legiſlature, by the ſtatute of 12 Car. 2. c. 12. ſ. 1. — 283, *notis.*

3. But after the reſtoration, when the civil law courts were again opened, the court of Chancery allowed demurrer to bills for alimony . 283

AMENDMENT.

1. An amendment has been made, after a writ of error allowed, in the day of the return, as making it *on the morrow of*, inſtead of *next after* — 82

2. So alſo the omiſſion of the word "*ſheriffs*" has been amended, after error allowed — — 82

3. So alſo the award of the writ of enquiry — — 82

4. In an action on the caſe, there was an interlocutory judgment on a writ of enquiry, and after final judgment given, a writ of error was brought; but the clerk, in making up the record, had omitted the words "*vi et armis*" and "*per ſacramentum*;" yet, it being merely the miſtake of the clerk, the court held it amendable, although it was matter of ſubſtance, and not of form — — 494

5. If judgment in debt on bond againſt an executor be entered in the *debet et detinet*, yet if the declaration on the file be in the *detinet* only, and agrees with the *niſi prius* record, it ſhall be amended; for it is a common rule, that *the plea roll* may be amended by *the file* at any time — 498

6. If the roll be of *Eaſter term*, in the firſt year of James the Second, and the declaration be on a memorandum

dum of a bill before *Charles* the late king, in an action of debt on bond, ſtated to be dated on the fifth day of November, in the thirty-ſixth year of the *ſaid Charles*, with an imparlance to *Eaſter term*, before which day the ſaid *Charles* died, the court will allow the record to be amended in order to have the *tranſcript* amended in the Exchequer Chamber 509

AMICUS CURIÆ.

1. A counſel, or any other perſon, though no way intereſted in the cauſe, may, as *amicus curiæ*, inform the court of error in the proceedings, to prevent their giving a falſe judgment — — 297

2. Any perſon, as *amicus curiæ*, may inform the court of an uſurpation of juriſdiction by an inferior court. But there ſeems an exception to this rule; for if a perſon has libelled in the Admiralty court, and after the cauſe has had a whole year's tranſaction there, he perceives that the opinion of the judge of the Admiralty is likely to be againſt him, yet the court will not grant a prohibition on *his* ſuggeſtion that the libel is founded on the conſtruction of *letters patent*, and therefore excluſively within the juriſdiction of the common law courts, for that would enable him to deprive the defendant of coſts, and to take an advantage of his own wrong — — 406

ANGLICE.

1. If an indictment for ſlandering a grand jury ſtate, "that whereas the "grand jury had preſented one "*William Spiller* for recuſancy," *anglice*, for not coming to church, the *anglice* ſhall be rejected as ſurpluſage; for the word "recuſancy" is of itſelf a ſufficient deſcription of the offence preſented, and therefore a falſe interpretation of it, eſpecial in *recital* only, ſhall not vitiate the indictment — — 209

APPEAL.

1. If a perſon be convicted of *manſlaughter*, on an indictment of *murder*, and, before clergy allowed, the widow of the deceaſed brings an appeal, the convict cannot pray his clergy until he is arraigned on the appeal — — 174.

2. But after being arraigned on the appeal, the court will allow time to the appellee to plead to it - 174

3. And formerly it was held, that the court might refuſe to record the priſoner's prayer of clergy, in order to prevent him from pleading the conviction on the indictment in bar — — 174, *notis.*

4. But it is now ſettled, that a conviction of manſlaughter, on an indictment of murder, and the prayer of clergy, or that he was ready to pray his clergy thereon, may be pleaded in bar to the appeal, not *ex gratia curiæ*, but *ex debito juſticiæ* 174, *notis.*

5. Same point — 382. 385

6. Same point — — 507

7. On an appeal of murder, charging that A. gave the mortal wound, and that B. was preſent, aiding and aſſiſting, a verdict finding that B. gave the wound, and that A. was preſent aiding and aſſiſting, is good 510

8. An *appeal* of murder, where the blow is given in one county, and the death happens in another, may be tried by a jury of the county where the death happens, although the 4 Edw. 6. c. 24. ſ. 3. mentions, in ſuch caſes, *an indictment* only 510, *notis.*

APPEARANCE.

1. A bail bond is for the appearance of the defendant, according to *the writ*, and not according to the condition of *the bond* — 51

2. Bail is no appearance, until it is filed — — 52

3. The condition of a bail bond being for the appearance of the defendant at the return of the writ, can only be performed by putting in bail above — — 52, *notis.*

4. The undertaking of an attorney for the appearance of a defendant is good, becauſe it is given to the plaintiffs in the action, and not to the ſheriff — 95, *notis.*

5. But any agreement or bond given to a ſheriff for the appearance of a perſon arreſted muſt be preciſely conformable to the ſtatute 23 Hen. 6. c. 10. — — 95, *notis.*

6. If a perſon arreſted *warrants* an attorney to appear for him, and *deſires* him to appear for his bail alſo, the appearance for the bail is without warrant — — 161

7. If a perſon be bound by recognizance to appear in the court of King's Bench on the firſt day of term, and on his appearance accordingly is charged with an information, he ſhall plead *inſtanter*; but if a man come in upon proceſs, and appear to an information, he has then an imparlance until the enſuing term — — 176

APPRENTICES.

1. A mandamus lies to the mayor of a corporation, to admit an apprentice, who has ſerved out his time, to the freedom of the corporation 154

2. And by 12 Geo. 3. c. 21. if after application for this purpoſe, the mayor ſhall delay to admit the apprentice for one month after *mandamus* ſerved, the mayor ſhall pay the coſts — — 154, *notis.*

3. An indictment on the 5 Eliz. c. 4. ſ. 31. againſt a perſon for uſing a trade without having ſerved an apprenticeſhip to it, ſtating that he had not ſerved either in *England* or *Wales*, is bad; for the words of the ſtatute are general, that if he has ſerved an apprenticeſhip in any trade, he may uſe ſuch trade any where within the realm of *England* or *Wales* — — 155

4. And therefore, if a perſon ſerve an apprenticeſhip abroad, he may uſe the trade here — 155, *notis.*

5. Overſeers may compel a maſter to take and provide for a pariſh apprentice — — 193.

6. By 8 & 9 Will. 3. c. 30. when any poor children ſhall be bound apprentice purſuant to the 43 Eliz. c. 2. the perſon ſhall receive and provide for them, according to the indenture 193, *notis.*

7. By 32 Geo. 3. c. 57. the covenants for the maintenance of pariſh apprentices, with whom no more than £. 5. ſhall have been given, ſhall continue in force no longer than three months after the death of the maſter — 193, *notis.*

8. An indictment againſt a perſon for uſing a trade, without having ſerved an apprenticeſhip, muſt aver that it was a trade in uſe at the time of paſſing the act — — 211

9. The act paſſed on the 12th January, 1562 — — 155, *notis.*

10. The ſeſſions may diſcharge an apprentice from his indenture, on account of the default or ill-treatment of the maſter, and order a return of the apprentice fee — 290

11. In an action of covenant on an indenture of apprenticeſhip, for not finding him "meat, drink, waſhing, and *other neceſſaries*," a breach aſſigned in the words of the covenant, without ſtating what thoſe neceſſaries were, is good — 473

ARBITRAMENT.

1. On a general ſubmiſſion of "all "matters in difference," an award to pay a ſum of money in ſatisfaction of a debt due from a third perſon, is bad — — 61

2. On a ſubmiſſion to arbitration, to

as the award be made on the twenty-firſt day of March, or ſo as the umpirage be made on or before the twenty-ſecond day of March, an umpirage made on the twenty-firſt of March is good, if the arbitrators make no award — — 164

ARREST.

1. To arreſt a man on a *capias utlagatum*, the officer may break open outer doors, after demand and refuſal — — 87

2. Upon what ſecurity a perſon arreſted on *meſne proceſs* may be diſcharged — — 95

ASSUMPSIT.

1. The clauſe in the ſtatute 29 Car. 2. c. 3. "that no action ſhall be "brought upon an agreement in "conſideration of marriage, unleſs "it be in writing," does not extend to promiſes made before, though not to be performed until after the making of the act — 17

2. A declaration on a promiſe, in conſideration that the plaintiff would diſcharge a third perſon, is good, without ſhewing how the diſcharge was given — — 28

3. An action of *aſſumpſit*, and an action of *deceit*, cannot be joined in the ſame declaration — 250

4. An *indebitatus aſſumpſit* does not lie againſt a man, where he has received money of the plaintiff to lay out to a particular uſe, and he has laid out part thereof accordingly; but if none of it had been laid out, or laid out for a different uſe than that directed by the plaintiff, an *indebitatus aſſumpſit* will lie to recover it back 301

5. A promiſe to pay, in conſideration that the plaintiff will deliver the defendant's cattle out of the pound, is good — — 329

6. If an action on the caſe be brought on a joint *aſſumpſit* againſt ſeveral, each of them cannot ſeverally plead that *he* did not promiſe in manner and form as ſtated in the declaration — — 487

7. If one man retain an attorney to do buſineſs for another, and promiſe to pay him, an *indebitatus aſſumpſit* lies againſt the perſon retaining on this expreſs promiſe — 421

8. In *aſſumpſit* brought by aſſignees under a commiſſion of bankruptcy, the promiſe muſt be alledged as made to the bankrupt — 238

9. An *indebitatus aſſumpſit* lies for money won at play, provided it be not at a game prohibited by the legiſlature — — 82

ATKINS.

1. *Sir Edward Atkins* made Chief Baron of the court of Exchequer 477

ATTACHMENT.

1. An attachment for a contempt is not abated by the demiſe of the king — — 467

2. But if ſervice of an attachment be made only three days after, and before notice of the king's demiſe, it is good — — 467, *note*.

3. And the return of the *cepi corpus* is good, though after notice of the demiſe — — 467, *notis*.

ATTACHMENT *(Foreign.)*

1. *Quære*, If to debt on bond, the defendant may plead that the plaintiff, being indebted to J. S. he made *an attachment* of the ſaid money in his hands — — 506

ATTORNEY.

1. The court will compel an attorney to re-deliver writings left with him to peruſe, though they concern himſelf and his title — — 165

2. A *mandamus* lies to ſwear in a man *an attorney* to an inferior court 154

3. If a perſon who is arreſted give an attorney a warrant to appear for him, and at the ſame time deſire him, when occaſion ſhall be, to appear for his bail, yet this will not

warrant him to appear for the bail 161

4. If one man retain an attorney for another, and promiſe to pay him, an *indebitatus aſſumpſit* on this *expreſs promiſe* lies againſt the perſon 421

ATTORNMENT.

1. In debt for rent by the bargainee of a reverſion, the omiſſion of ſtating "*attornment*" in the declaration is aided by the verdict — 234

2. But by 4 & 5 Ann, c. 16. and 11 Geo. 2. c. 19. the neceſſity of attornment is taken away 234, *notis.*

AUDITA QUERELA.

1. An *audita querela* cannot be brought in Chancery, on a judgment obtained in the court of King's Bench 239

2. If a ſuperſedeas be granted to an *audita querela*, upon the proceſs of *venire facias*, before bail found, it is irregular — — 239

3. *Qu.* Whether the court will take bail and ſtay execution on an *audita querela*, if the *ſuperſedeas* on it is irregular — — 240

4. A defendant after judgment for recuſancy on a *qui tam* action cannot have an *audita querela* on a ſuggeſtion of *conformity*, for they cannot plead it in diſcharge of the king's part of the penalty —

5. An *audita querela* may be founded on the biſhop's certificate of conformity — — 240

6. A recuſant, after judgment on a *qui tam* action, on the ſtatute 23 Eliz. c. 1. cannot have an *audita querela* to prevent execution on a certificate of conformity, for he might have pleaded conformity to the action — — 240

AVOWRY.

1. An avowry for rent muſt ſtate a good title to the premiſſes on which the diſtreſs was made; but if the avowry ſtate a deed indented, by "virtue of which the party was "ſeiſed in his *demeſne, as of fee*," the want of ſtating the conſideration on which the deed was made is helped, after verdict, by the replication of *nothing in arrear* — 19

2. An avowry *ſur matter in le terre*, by one of two tenants in common, for the *third part* of a penny rent, is good — — 26

3. A leſſor ſhall not avow upon his tenant for life for rent reſerved upon the leaſe as *upon his very tenant*, but as upon his tenant *by the manor*, but otherwiſe upon a tenant in fee or in tail — — 26

4. An avowry for *damage feaſant*, and a preſcription pleaded by a burgeſs, that the mayor and burgeſſes of the corporation have, time out of mind, had a right of common for themſelves, and each of them, in the *locus in quo* — — 44

5. An avowry for *damage feaſant*, and a preſcription pleaded generally to have common in *a foreſt* at all times throughout the year — 9

6. To replevin for taking ſix cows, if the defendant avows the taking *damage feaſant*, and the plaintiff replies a ſeiſin of certain lands, and a right of common of paſture for beaſts *levant et couchant*; A REJOINDER, with an *abſque hoc*, that thoſe were the proper cattle of the plaintiff, *levant et couchant* on thoſe his lands, is good — 329

7. An avowry under a diſtreſs for rent, alledging a poſſeſſion under a term of years, is good — — 484

AWARD.

1. On a ſubmiſſion of "all matters in "controverſy," an award that the defendant ſhall pay thirty pounds to the plaintiff out of the eſtate of a *third perſon*, of whom no mention was made in the arbitration bond, is void — — 61

2. On a bond conditioned to perform the award of two arbitrators, if made on the twenty-firſt of March, and for want of ſuch award to perform the award of an umpire, ſo as it be made on or before the twenty-ſecond day of March; an umpirage made on the twenty-firſt of March is good, if the arbitrators make no award — — 164

BAIL.

1. A defendant in execution for a fine, on a conviction for a riot, admitted to bail, on a recognizance to proſecute his writ of error with effect, or to pay his fine — 94

2. A *latitat* may be ſued out againſt the bail after the return of the *non eſt inventus*, or the *capias ad ſatisfaciendum* againſt the principal; but if the bail ſurrender the principal before declaration delivered on the *latitat*, the court will ſtay the proceedings againſt the bail — 80

3. In a *ſcire facias* againſt *one* of two perſons, as the bail of one defendant in a joint action againſt two, an averment that *he* had not paid is ſufficient — — 147

4. In ejectment on judgment againſt the *caſual ejector*, a *latitat* ſhould be ſued out, and bail filed — 249

5. If three men bring an action, and the defendant puts in bail at the ſuit of four, they cannot declare againſt him; but if he had put in bail at the ſuit of one, that one might have declared againſt him — 281

6. A defendant removed by *habeas corpus* from an inferior court ſhall put in common or ſpecial bail in the court above, according as he would have been obliged to do in the court below — 102

7. In what manner bail were formerly liable — — 183

8. Bail, on a *cepi corpus*, are only liable for the ſum indorſed on the writ, and on *habeas corpus* to thoſe actions only that are returned — 183

9. Bail are not liable for more than the ſum ſworn to in the firſt action 335

10. A *peer* of the realm, committed by the *Houſe of Lords* on an impeachment carried up againſt him by the *Houſe of Commons*, may, on the ſeſſions being prorogued, or the parliament being diſſolved, be bailed by the court of King's Bench to appear at the bar of the Houſe of Lords on the firſt day of the enſuing ſeſſion or meeting of parliament — 336

11. A plea by bail, that the principal rendered himſelf in diſcharge, muſt ſay, *prout patet per recordum* — 398

12. To debt on a bail bond, a plea, that, before the day of appearance, the principal was ſurrendered in diſcharge of his bail, is good 443

13. *Qu.* If a perſon be in execution for a fine on a conviction for a miſdemeanor, and be detained on a *capias in withernam* iſſued againſt him on the return of *elongavit* to a *pluries homine replegiando*, whether, on receiving a pardon for the fine, he can be bailed on the *capias in withernam* — — 222

14. If a *ſuperſedeas* be granted to an *audita querela*, upon the proceſs of *venire facias*, before bail found, it is irregular — — 239

BANKERS.

1. If a factor ſell the goods of his principal, and receive a draft from the vendee on his banker for the value of them, and accept from the banker *notes of hand* in diſcharge of ſuch draft, the principal cannot recover the value of the goods from the vendee, although the banker fail before the notes become due; for *the principal*, by receiving the notes from *the factor*, takes *the banker* as his debtor, and thereby releaſes *the vendee* — — 296

2. The holder of a banker's draft cannot recover againſt *the drawer* on non-payment by *the banker*, if he give the banker credit for it, or

neglect to demand the payment of it in due time — — 297

BANKRUPTS.

1. Commiſſioners of bankrupts, having once examined a man, cannot examine him again, unleſs it be upon a new commiſſion. *Sed qu.* 102.

2. If one of two partners become a bankrupt, the aſſignees cannot maintain *trover* for money due to the *partnerſhip*, but they may recover a moiety in an action of *aſſumpſit* 103

3. A leaſe made by an aſſignee of commiſſioners of bankrupts of the bankrupt's land, before the deed of aſſignment is enrolled, is void 156

4. Aſſignees of bankrupt cannot ſell or convey real eſtate, except by deed indented and inrolled; and the inrolment muſt be within ſix months after the making thereof 158, *notis.*

5. In an action of *aſſumpſit* brought by aſſignees of a bankrupt, the promiſe muſt be alledged to have been made to the bankrupt — 238

A meſſenger of commiſſioners of bankrupts cannot break open a houſe to ſearch for the bankrupt's goods, unleſs it be the bankrupt's goods in the houſe of the bankrupt — — 243

7. An arreſt made by an executor, before probate is obtained, is good, as between the parties themſelves, but not to affect the intereſts of third perſons; and therefore, if a perſon ſo arreſted be a trader, and give bail to the arreſt, and afterwards ſurrenders in diſcharge of his bail, and lies in priſon two months, it ſhall not be an act of bankruptcy from the firſt arreſt, ſo as to avoid a payment made by the bankrupt to another creditor, on the day that the probate was granted; but if the arreſt be legal, the act of bankruptcy ſhall relate to the time of the ſurrender — — 253

8. If a trader be arreſted on ſeveral actions, and give bail to them all his not paying the debts in ſix months after ſuch arreſt, and bail given, ſhall not make him a bankrupt until after the ſix months; for the ſtatute 21 Jac. 1. c. 19. which enacts, "that if any perſon ſhall be "arreſted, and ſhall not pay or compound for the ſame in ſix months, "he ſhall be adjudged a bankrupt," ſhall not relate to the time of the arreſt — — 513

9. But this act of bankruptcy is repealed by the ſtatute of 10 Ann, c. 15. — — 514, *notis.*

BASTARDS.

1. An order of juſtices to pay ſo much a week for the maintenance of a baſtard child, "*until further order be* "*made*," is good — 130

2. The reputed father of a baſtard child is diſcharged from *the order* reſpecting it, on its death, or attainment of twenty-one — 130

3. The reputed father of a baſtard may be ordered to pay a ſum *in groſs* for its maintenance, and for the charge expended by the pariſh in the delivery of it — 132. 258.

4. Formerly it was held, that the ſeſſions could not make an *original order* in the caſe of a baſtard child; but now the ſtatute 3 Car. 1. c. 4. ſ. 15. enacts, "that juſtices of the "peace, in their ſeveral *ſeſſions*, may "do and execute that part of the "18 Eliz. c. 5. which relates to "baſtards" — — 132

5. *Qu.* If an order of maintenance, to pay ſo much a week until the child attain to ſuch an age, be good 132

6. Precedent of the form of an order for the maintenance of a baſtard 256

7. An order of maintenance is good, although it do not ſtate that the two juſtices by whom it was made were the two *next* juſtices, &c. according to the words of 18 Eliz. c. 3. ſ. 2. "that

" that two juſtices of the peace, in " or next unto the limits where the " pariſh church is, within which " pariſh ſuch baſtard ſhall be born, " may make order therein, &c." 258

8. An order of maintenance, to pay ſuch a ſum for the maintenance of a baſtard child, " until the reputed " father ſhall be diſcharged by the " pariſh," is good — 258

9. The ſecurity given by the reputed father ought to be in the disjunctive, " to perform the order, *or* to " appear at the next quarter ſeſſions to abide by ſuch order as " ſhall there be made" — 258

10. An order of baſtardy may be quaſhed in part, and confirmed in part — — 258

BILL OF EXCEPTIONS.

1. A bill of exceptions lies in the King's Bench, on a trial at bar 146

2. But in a ſubſequent caſe it is ſaid, that a bill of exceptions will not lie on a trial at bar — — 288

3. A bill of exceptions will not lie at ſeſſions, reſpecting an order of removal — — 147, *notis.*

BILLS OF EXCHANGE.

1. A declaration on a bill of exchange is good, after verdict, although it be not averred that the parties are merchants — — 8

2. A bill of exchange, payable " to " the order of A." is a bill payable to A. — — 8

3. A general *indebitatus aſſumpſit* will not lie by an *indorſee* againſt the *drawer* of a bill of exchange; but the plaintiff ought to declare ſpecially on the cuſtom of merchants — 9

4. But it will lie by *a payee* againſt *the drawer*, or by the *indorſee* of a note of hand againſt the next immediate *indorſer* — — 9, *notis.*

5. A declaration on a bill of exchange againſt *the drawer*, muſt ſtate that it was tendered to the *drawee*, and that he refuſed to *accept* it — 180

6. On the trial of an action againſt *the drawer* of a bill of exchange made payable to *the bearer*, the plaintiff muſt prove that he paid a valuable conſideration for it, although, in practice, indorſements are never made on bills payable to bearer; for otherwiſe, a perſon who came to the poſſeſſion of ſuch a bill by caſualty or knavery might recover on it 236

7. Formerly, bills and notes payable *to bearer* were not conſidered within the *cuſtom of merchants*; but now by 3 & 4 Ann, c. 9. all notes payable to bearer are put on the ſame footing as bills of exchange 236, *notis.*

8. An innocent holder of a bill or note indorſed in blank, and made payable to bearer, ſhall recover on it, although it was loſt or ſtolen 236, *notis.*

9. But the holder of a bill or note originally given on a *uſurious contract*, or for *money won at play*, or after *ſix years have elapſed*, cannot recover on it, although it came into his hands *bona fide*, and for a valuable conſideration — — 236, *notis.*

10. The want of conſideration of a note or bill cannot be averred by the drawer, or maker thereof, except the action be brought by the *payee*, or the bill or note be not within the cuſtom of merchants 236, *notis.*

11. In an action on a foreign bill of exchange, if the date be omitted, the court will intend it dated at the time it is ſtated to have been drawn 422

12. If the *indorſee* of a bill of exchange, on default of payment by the *acceptor*, recover againſt the *drawer*, but do not take out execution, this recovery cannot be pleaded in bar to a ſecond action on the ſame bill by the ſame *indorſee* againſt the *laſt indorſer*; for although he recovered *damages* in the firſt action, he did not receive *ſatisfaction* 442. 495

13. If a declaration on a bill of exchange

change does not alledge the plaintiff to be a merchant or trader, it is bad 459

14. In an action by an *indorſee* againſt *the drawer* of a bill of exchange, payable to A. or *order*, for the *uſe* of B. the defendant cannot plead that B. was indebted to the king, and that monies to the amount of the bill were levied on *him*, under AN EXTENT, at the ſuit of the crown 510

15. A declaration on a bill of exchange, ſtating that the defendant had not paid, *at* or *after* the day of payment, &c. is good — 437

BONA NOTABILIA.

1. A judgment recovered in the court of King's Bench at *Weſtminſter*, is *bona notabilia* in the county of *Middleſex* — — 438

BONDS.

1. Debt on a ſheriff's bond, conditioned to anſwer the plaintiff in a plea of *treſpaſs* generally, is good, although the writ is to anſwer in a plea of treſpaſs with an *ac etiam* in debt 51

2. A bond given to a ſheriff, for the diſcharge of a priſoner in cuſtody on *meſne proceſs*, muſt be purſuant to the ſtatute — — 95

3. Pleadings in debt on bond given to the maſter and wardens of the Company of Taylors, in Exeter, not to exerciſe the ſaid trade, in the ſaid city, otherwiſe than as a journeyman 346

4. Such a bond is void, as being in reſtraint of trade — 350

BOOKS.

1. The court of Chancery will grant an injunction againſt ſelling Engliſh *primmers* and *pſalms*, printed in, and imported from Holland — 259

2. The patent made to the Stationers Company, by James the Firſt, is reſtrained to the excluſive printing of ſuch *almanacks* as ſhall be allowed by the archbiſhop of Canterbury, or the biſhop of London 261, *notis*.

BREACH OF COVENANT.

1. In an action on a covenant, that the plaintiff ſhall have the firſt quarter's rent due at the *Lady-day* next enſuing the date of the deed, *&c.* if a breach aſſigned that the defendant *obſtructed and hindered* the plaintiff from receiving it, is ſufficient 75

2. On a covenant for rent, payable at the two moſt uſual feaſts of the year, *St. John the Baptiſt* and *Chriſtmas*, or within fourteen days after, the firſt payment to be at *Chriſtmas* next after the date of the deed; a breach aſſigned, that the defendant did not pay the rent at *Chriſtmas*, without ſaying, "nor within the fourteen "days," is bad — — 77

3. If the grantee of a rent-charge covenant "for him, his heirs and exe- "cutors, *to pay, &c.*" an action of covenant lies againſt the executor for rent accruing after the death of the grantor, although the grantee had entered purſuant to a clauſe in the deed for rent arrear previous to the death of the grantor — 333

4. On a covenant to repair; a breach aſſigned, that the houſe was burned before the time, is not good; for the leſſee is liable on the covenant, notwithſtanding the houſe was deſtroyed — — 401

5. On a covenant, upon an aſſignment of debts, not to do any act or thing whereby the plaintiff ſhould be hindered from receiving the ſaid debts, *quære* whether a breach "that "he releaſed one J. S. ſo much "money due and owing to, &c." be well aſſigned, without ſhewing how the releaſe was made — 417

6. On a covenant, "for quiet en- "joyment, free from all lawful in- "terruption," a breach aſſigned, that the defendant, "claiming title "and

" and lawful right under A. B. en-
" tered," is ſufficient; for it is not a breach aſſigned by the act of *a ſtranger*, but of *the covenantor* himſelf — — 426

7. In covenant on an indenture of apprenticeſhip, for not finding him meat, drink, waſhing, and *other neceſſaries*; a breach aſſigned in the words of the covenant, without ſtating what thoſe neceſſaries were, is good — — 472

8. Same point — — 443

BYE LAWS.

1. *Qu.* Whether a bye law, made by the Brothers of the Trinity Houſe, that no ſhip laden with *gunpowder* ſhall continue in harbour longer than twenty-four hours, be good 96

2. All bye laws bind either *ratione loci*, or *ratione perſonæ* — 96

3. If the ſteward of a city neglect to take the oaths appointed by 25 Car. 2. c. 2. debt will lie againſt him on a *bye law* impoſing a fine on ſuch as ſhall refuſe to take upon them ſuch office — 159

4. In debt on a bye law, for a fine made in an ancient court before the mayor, it ſhall be intended, after verdict, that THE MAYOR was qualified to impoſe the fine — 159

5. In what manner a declaration in debt on a bye law for a fine muſt ſtate *the title* to the fine — 159

CANONS.

1. A *mandamus* will not lie to the *precentor and canons* to admit *a canon* to his ſtall in the cathedral, on a cuſtom to chuſe a ſupernumerary, when all the ſtalls are full, until a vacancy happens — 200

2. A *mandamus* will lie to a *dean and chapter*, to admit *a prebendary* to his ſtall, or to fill up a vacancy among the *canons reſidentiary* — 200, *note*.

CAPE.

1. In a writ of dower, if iſſue be joined on a plea that an eſtate for life was ſettled on the demandant in lieu of dower, and the tenant make default at the *day in bank*, a *petit cape* may iſſue, and on its return the demandant have judgment — 62

2. If, in writ of dower, an iſſue be taken that an eſtate for life was ſettled in lieu of dower, and a *petit cape* iſſue to ſeize a third part of a manor, and for a third part of a moiety of the other lands, a return that, " by " virtue of the king's writ to me " directed, I have ſeiſed into my " hands a third part of the tene- " ments within ſpecified," is good 62

3. In a writ of dower, if a *grand cape* iſſue, and a writ of error be brought, there are no continuances returned, they are only entered on the filazer's roll; in a *petit cape* all the proceſs and continuances muſt be entered 148

4. A judgment in a *quod ei deforceat*, at the grand ſeſſions in Wales, is erroneous, if there be no *appearance* entered, or *grand cape* iſſued - 424

CARRIERS.

1. A *common carrier* is liable for the loſs of goods delivered to him to carry, although no particular ſum is agreed on as the price of carriage — — 82

2. But if a parcel containing *money* be delivered to a carrier, and only the common rate of carriage paid, when it is uſual to be paid at a higher rate for ſuch articles, the carrier is not liable if the parcel be loſt; for the reward or hire, which creates the warranty, ought to be proportionate to the riſque, and he *ought to be appriſed of what he undertakes to carry* — — 82

3. A *ſtage-coachman* is a common carrier within the cuſtom of the realm, and

and is liable for the loſs of goods which paſſengers take with them, although no hire was particularly paid for the carriage of the goods - 128

4. But ſee Middleton v. Fowler, contra 129, *notis.*

5. In a declaration for the loſs of goods, it is ſufficient to deſcribe the defendant as a *common carrier*; for he is as ſuch liable upon the *general cuſtom* of the realm, of which cuſtom the court is bound to take notice 128, *notis.*

6. A carrier is not obliged to take more than his uſual weight of goods, and number of paſſengers; and therefore, if a perſon put a box behind a ſtage coach, and the coachman, having no room, refuſe to take charge of it, he is not liable if it be loſt 129

7. *Qu.* If the declaration ſtate the defendant to be a common carrier from *Marlborough* to *London*, and evidence is given that he never came nearer to *London* than *St. James's Market*, whether this is a variance 129

8. An action lies againſt a common carrier for refuſing to carry goods, if he has the conveniency of ſo doing — — 328

9. The proprietors of a ſhip, commonly employed in carrying goods on freight, are liable as *common carriers* for the loſs of goods ſhipped; but the action muſt be brought againſt all the part owners, or the defendants may plead it in abatement 479

CASE.

1. An action on the caſe, in the nature of a writ of conſpiracy for a malicious proſecution, will lie againſt *one perſon* only, although the jury did not find the bill of indictment; but the declaration muſt ſhew that the proſecution is at end — 51

2. An action on the caſe for a malicious proſecution will lie, though the defendant be acquitted on a defect in the indictment — 51, *notis.*

3. In an action on the caſe for ſtopping a gutter, a declaration in a *que eſtate* of the houſe to which the ſtopping the gutter was a *nuiſance*, is bad, unleſs it ſhew a *ſeiſin in fee* 81

4. An action on the caſe, on the cuſtom of the realm, lies againſt a common carrier, for the loſs of goods delivered to him to carry — 82. 127. 327. 479

5. An action on the caſe lies for maliciouſly citing a churchwarden to account in the ſpiritual court, knowing that he had accounted before, though nothing enſue but *excommunication*: the declaration need not ſtate the particulars of the cauſe 145

6. An action on the caſe for a malicious proſecution muſt ſhew that it was without *probable cauſe*; a declaration ſtating that it was without *juſt cauſe*, is bad — 154

7. To an action on the caſe for a malicious proſecution, a plea that the action was brought to recover a debt on bond, without alledging that the money was due and unſatisfied, is bad — — 246

8. An action on the caſe lies for a malicious proſecution by *information* as well as by *indictment* — 295

9. In an action on the caſe againſt *two* defendants *jointly*, for a malicious proſecution, if the jury find both of them guilty, and give £. 1000 damages againſt one, and *fifty pounds* damages againſt the other, the plaintiff may enter a *nolle proſequi* againſt the defendant as to the *fifty pounds*, and ſign judgment againſt the other for the *thouſand pounds* — 469

10. The court will not change the *venue* in an action on the caſe in the nature of conſpiracy, if it appear that the plaintiff's intereſt with the ſheriff of the county in which it is laid is ſo powerful that an impartial trial is not likely to be had 198

11. Judgment on a declaration in an action

action on the caſe, for forging and publiſhing an order of Chancery, and charging, in another count, that the defendant, on the ſame day, made a defamatory picture in the ſaid order, is good, though *intire damages* be given; for the forging of the order is only *inducement*, and the *order* and *libel* therein are one complicated act — — 313

12. *Qu.* whether an action on the caſe will lie againſt an alien artificer for the *uſe and occupation* of a dwelling-houſe, of which he had taken *a leaſe* from the plaintiff; the leaſe being void by the 32 Hen. 8. c. 16. ſ. 13. 135

13. A declaration in an action on the caſe, for diverting a watercourſe, with a *debet et ſolet currere* only, is good; for being againſt *a wrong doer*, poſſeſſion is ſufficient — 243, 249

CHALLENGE.

1. A demurrer will lie to a *challenge of the array*, or *an iſſue* may be taken on the fact alledged — 422

2. It was formerly a good cauſe of challenge on the indictment of *a peer* for a miſdemeanor, that no *knight* was returned on the jury 262

3. But now, by 24 Geo. 2. c. 18. no challenge ſhall be taken by a peer or lord of parliament, to *the pannel* of jurors, for want of a *knight* being returned on ſuch pannel, nor any *array* quaſhed by reaſon of ſuch challenge — — 262, *noti*

4. On an indictment for high treaſon, the defendant cannot challenge a juror for not having a freehold 311

5. If, on an *indebitatus aſſumpſit*, the defendant challenges *the array* on account that the *venire* was directed to the ſheriffs of London, when one of them was plaintiff, the challenge may be ſaved by allowing a bill of exceptions — — 263

6. But, on an action againſt the chamberlain of London, if the challenge be, that one of the ſheriffs, to whom the *venire* was directed, is plaintiff, the *venire*, on this fact being ſuggeſted on THE ROLL, ſhall be directed to the other ſheriff — 287

7. If a ſheriff die, and his ſucceſſor be challengeable, a ſuggeſtion may be entered, and the *venire* directed to the coroner — — 288

8. If a ſheriff, being co-defendant, return the *venire*, it is cauſe of challenge, though he did not plead until after the award of the writ 288

CHANCERY.

1. If a huſband ſue in *Chancery* for his wife's portion, the court, upon the prayer of the wife's friends and relations, will force him to ſecure the ſame, part for his wife and part for the children — — 282

2. During the rebellion, the practice was for a wife to ſue in Chancery for *alimony*, becauſe the eccleſiaſtical courts, during thoſe times, was not opened to ſuitors — 283

3. But ſince the juriſdiction of the civil law has been reſtored, the Chancery allows demurrers to bills brought in that court for alimony 283

CHARTER PARTY.

1. To covenant for non-payment of rent under a charter party, the defendant may plead that the goods were damaged by the fault of the maſter, and that, by the cuſtom of merchants, he retained the freight in compenſation — — 167

2. If advance money be paid in part of freight, and named ſo in a charter party, although the ſhip be loſt before it come to the port of delivery, yet wages are due according to the proportion of the freight paid before 283

CHURCH.

1. The ſpiritual court cannot be *prohibited* from enforcing the payment of a pariſh rate made by the majority of the pariſhioners in veſtry aſſembled, made for the re-building and enlarging the nave of the church, although it be ſuggeſted that the tax was unreaſonable, and the libel may ſtate that the pariſhioner was rightly taxed — 141

2. A perſon cannot be taxed for the amendment of a church, if he be not an inhabitant of the pariſh 142

3. The majority of the pariſhioners may raiſe a tax for the re-building of a church that cannot be repaired 143

4. But they cannot build a new church 143

CHURCH-YARD.

1. The freehold of the church-yard is, *prima facie*, in the parſon, but *by cuſtom* it may belong to the pariſhioners — — — 184

COCK-FIGHTING.

1. The keeping of a *cock-pit* is an indictable offence, in as much as it is a *nuiſance* at common law 36

2. The practice of cock-fighting, if done for lucre, is common gaming, within the ſtatute 33 Hen. 8. c. 9. ſ. 4. — — 36

COMMITMENT.

1. Perſons committed by *rule* of the court of King's Bench are not entitled to be diſcharged under the *habeas corpus* act — — 87, 88

2. A perſon committed by the court of King's Bench for *a contempt* cannot have *a day rule* — 88

3. A warrant of commitment under the *ſign manual* is bad, and the court of King's Bench will diſcharge the party on a *habeas corpus* — 484

COMMON.

1. A perſon may, by preſcription, have common in *a foreſt* at all times throughout the year, without an exception of the *fence month* — 9

2. A preſcription for common of paſture for all beaſts *levant et couchant*, as appendant to *a houſe*, is good, for it ſhall be intended to have a ſufficient curtilage on which the commonable cattle may be *levant et couchant* — — 248

3. In replevin for ſix cows, if the defendant avows for *damage feaſant*, and the plaintiff replies a *ſeiſin* of certain lands, and a right of *common of paſture* for beaſts *levant et couchant*, the defendant may *traverſe* that the cattle were the cattle of the plaintiff — — — 329

CONDITION.

1. A condition to leave the obligee a *third part* of his eſtate is not performed by the obligor making the obligee *a joint executor* with *two* other perſons — — 69

2. A bond conditioned for the delivery of 35,000 tiles, to the value of 144*l.* at 1*s.* 6*d.* a thouſand, is good for the ſum of 144*l.* although the number of tiles at the price mentioned does not amount to that ſum 16

CONSIDERATION.

1. A declaration on a promiſe, in conſideration the plaintiff would diſcharge a third perſon, is good, without ſhewing how the diſcharge was given — — 28

2. An endeavour to procure A. to marry the defendant is a good conſideration in *aſſumpſit*, but ſome particular act evincing that the plaintiff did endeavour muſt be ſtated — 95

CONSPIRACY.

CONSPIRACY.

1. A *writ of conſpiracy* muſt be againſt *two* perſons, but an *action on the caſe*, in the nature of a writ of conſpiracy, may be brought againſt one perſon only — — 50

2. An information againſt one perſon, for agreeing with another to prove that a deed was forged for the purpoſe of corruptly procuring a verdict in a civil action, is good, although it do not ſtate that the agreement was by *conſpiracy* between the parties — — 2

3. It is not neceſſary that any *overt act* of conſpiracy be laid in an indictment for a conſpiracy 2, *notis.*

4. Juſtices at ſeſſions cannot try an indictment for *a conſpiracy* under the commiſſion of the peace — 413

CONTINUANCES.

1. In dower and *grand cape* there are no *continuances* returned on a writ of error; they are only entered in the filazer's roll; but where a *petit cape* iſſues, all the proceſs and continuances muſt be entered — 148

2. Upon a judgment above a year ſtanding, an *elegit*, but not a *fieri facias*, may iſſue without a *ſcire facias*, for an *elegit* is continued all along from the judgment — 235

CONTINUANDO.

1. Treſpaſs *quare clauſum fregit* and dug up ſlate, laid with a *continuando*, is good; for the continuance ſhall be referred to that part of the treſpaſs which is capable of continuation — — 196

2. Treſpaſs for breaking and entering the plaintiff's cloſe, and treading down his beans, laid with a *continuando* from the 29th of September to the 2d of February following, is good — — 462

3. Treſpaſs of aſſault and battery, and falſe impriſonment for thirteen years 493

CONVENTICLES.

1. Although an information on the conventicle act of 22 Car. 2. c. 1. be laid by two perſons, yet one may have an action for the penalty 234

2. In debt againſt a juſtice of the peace for the penalty for not granting a warrant as directed by the conventicle act, the declaration need not aver that the perſons informed againſt were above ſixteen years of age, provided it ſtate, that the perſons congregated at the conventicle were above that age — 234

3. By 1 Will. and Mary, c. 18. neither 35 Eliz. c. 1. nor the conventicle act of 22 Car. 2. c. 1. ſhall extend to any perſon preſent at, nor to any preacher in, any congregation, who ſhall have regiſtered a certificate from the biſhop, and have taken the oaths, &c. as the act directs — — 235

4. In an action of debt on 23 Eliz. c. 1. for not coming to church, the court, on a ſuggeſtion of conformity, will, after verdict for the plaintiff, allow the defendant time to enter *the plea* 239

5. The 23 Eliz. c. 1. extends to *proteſtants* as well as to *papiſts*, and the indictment may be found in any county — — 298

6. A *diſſenting miniſter* committed on the Oxford act, 17 Car. 2. c. 2. for reſiding within five miles of a corporation, ſhall be diſcharged, unleſs it appear upon the warrant that he is a parſon, vicar, or other beneficed perſon — — 330

7. An action on 23 Eliz. c. 1. againſt *a wife*, ſhall not be ſtayed on the conformity of the huſband — 332

CONVICTION.

1. If a defendant appear in the court of

of King's Bench, to recover judgment on a conviction of nuiſance, the conviction ought to be kept in force until it be removed — 60

COPYHOLD.

1. A ſurrender by a copyholder to a *diſſeiſor* of the manor does not extinguiſh the copyhold — 153

2. In debt for rent on a leaſe of *copyhold* and *freehold* lands, if the defendant plead *eviction* from all the lands, in bar, and the plaintiff reply that another perſon was ſeiſed of the *freehold*, and traverſe the ſeiſin alledged in the plea, a *general verdict* for the plaintiff is good — 399

3. If a ſurrender of a copyhold be made to the uſe of the ſurrenderor for life, with remainder in tail to his ſon *John*, if he attain to the age of eighteen years, and if he die before that age without iſſue male, then to his right heirs, this is a veſted, and not a contingent remainder 398

4. The ſurrender in court of a copyhold by huſband and wife, to a tenant in poſſeſſion by a wrongful title, ſhe being examined by the ſteward, binds the wife, although there is no cuſtom to ſupport it — 83

5. If A. be copyholder for life, with remainder to B. for life "to commence from and after the death of A. or other ſooner determination of his eſtate," and A. is *attainted* of high treaſon, the copyhold is forfeited to *the lord*, and he in remainder may enter without preſentment, although the offender be pardoned 150

6. If a copyhold eſtate be granted to A. for life, remainder to B. for life, remainder to C. when the cuſtom of the manor is, that in an eſtate ſo granted, the perſon firſt named may *ſurrender* the eſtate, according to the cuſtom of the manor, into the lord's hands, and thereby deſtroy the remainders, and A. join in A FINE *ſur conuſance* with the lord, conveying the eſtate to other perſons, the remainders are not thereby deſtroyed; for as the intereſts of *third perſons* are concerned, *a fine* ſhall not be conſidered *a ſurrender* — 131

7. A cuſtom of a manor, that every tenant who ſhall be admitted to any copyhold eſtate ſhall pay "ſo "much as the lands or tenements "ſhall be worth a year at the time "of ſuch admiſſion, and not more," is a good cuſtom; for although it is uncertain what the value may be, yet it may be aſcertained by a jury, and *id certum eſt quod certum reddi poteſt* — — 508

CORNISH.

1. *Alderman Corniſh* tried at the Old Bailey, and convicted, on the evidence of his own under-ſheriff, of high treaſon, and executed in *Cheapſide* — — 434

CORPORATION.

1. An avowry by a burgeſs of a CORPORATION, conſiſting of twelve capital burgeſſes called *freemen*, and twelve inferior burgeſſes called *ſtallingers*, that every freeman inhabiting a houſe in the corporation hath, by *cuſtom*, a right of common in certain lands belonging to the corporation, is good — — 78

2. A corporation aggregate may be forfeited by a breach of the truſt upon which it was granted; and the corporation of London is, in this reſpect, like every other corporation; and therefore, if the mayor and common council extort, under pretence of a bye law, money from all the King's ſubjects who ſhall reſort to the city markets, or make and publiſh a ſcandalous and libellous petition, it is a forfeiture of their franchiſes; for the acts of the mayor and common council are the acts of the corporation, for which an information in *quo warranto* may be maintained; and, on judgment for the king, the franchiſe may be ſeized into the king's hands — — 264

4. But

3. But by 2 Will. and Mary, ſ. 1. c. 8. the judgment given in the above caſe is declared illegal 279, *notis.*

4. A judgment in *quo warranto* to ſeize the liberties of a city does not diſſolve the corporation 279, *notis.*

5. Judgment of ſeizure *quouſque* ſhall be given on non-appearance of a corporation to an information in nature of *quo warranto* — — 366

6. If a corporation neglect to plead after judgment of ſeizure *quouſque* final judgment ſhall be given — 366

7. Appearance by a corporation muſt be by warrant under ſeal 366

8. The king may incorporate a certain number of merchants, and give them the excluſive right to trade in certain diſtricts beyond the ſeas 367

9. The corporation act pleaded 233

10. The corporation act explained 247

COSTS.

1. In treſpaſs for deſtroying ſtands in a fair, though annexed to the freehold, the plaintiffs ſhall have full coſts, though damages are under forty ſhillings, if the judge do not certify, purſuant to 22 and 23 Car. 2. c. 9. — — 258

2. *Qu.* Whether a verdict given for 100*l.* damages, and 6*d.* coſts, and judgment to recover his damages aforeſaid to 100*l.* and 10*l.* *de incremento*, be good — — 56, 89

COVENANT.

1. In covenant on an indenture of apprenticeſhip for not finding him "meat, drink, waſhing, and other neceſſaries," a breach aſſigned in the words of the covenant, without ſtating what the neceſſaries were, is good 472

2. On a covenant upon aſſignment of debts, not to do any act or thing whereby the plaintiff ſhould be hindered from receiving the ſaid debts, *Qu.* whether a breach "that he releaſed one J. S. ſo much money due and owing to, &c. be well aſſigned, without ſhewing how the releaſe was made — — 417

3. If the grantee of a rent charge covenant "for him, his heirs and executors, *to pay*," &c. an action of covenant lies againſt the executor for rent accruing after the death of the grantee, although the grantee had entered purſuant to a clauſe in the deed, for rent arrear previous to the death of the grantee — 333

4. A covenant to pay money at a future day is diſcharged by *a releaſe* of "all debts, dues, actions, cauſes of action, obligations, and writings obligatory," made before the day of payment — — 90

5. On a covenant "for quiet enjoyment free from all lawful interruption," a breach aſſigned that the defendant "claiming title and lawful right under A. B. entered, &c." is ſufficient; for it is not a breach from the act of *a ſtranger*, but of the *covenantor* himſelf — — 426

6. On a covenant to have rent, *Quære*, if ſtating that the defendant *obſtructed* and *hindered* the receiving of it is ſufficient — — 75

7. A covenant to pay rent at *Chriſtmas* and *Midſummer*, or within fourteen days after, is not broken by non-payment on *Chriſtmas day* — 77

8. A leſſee is liable on a covenant to repair, although the houſe is burned down — — 402

9. An action of covenant for non-repair, brought by an *aſſignee of the reverſion* againſt *the leſſee*, muſt be laid in the county where the eſtate is ſituated — — 200

10. The court will grant a new *writ of enquiry* in an action of covenant, if it appear that the damages given are greatly inferior to the eſtimate proved in evidence — 201

11. If A. grants a leaſe for years to B. and C. who covenant, for themſelves and their aſſigns, to pay the rent to A. and his aſſigns, according to the reſervation, and B. with the conſent of A. aſſigns the remainder of his intereſt in the term to C. and afterwards

terwards aſſigns his *reverſion* to D. D. as *aſſignee of the reverſion*, may maintain covenant againſt B. for rent accrued after the aſſignment of his intereſt in the term to C.; for no act of the leſſee can diſcharge him or or his aſſigns from the *ſpecial covenant*, of which the *aſſignee of the reverſion* ſhall have advantage, by the ſtatute 32 Hen. 8. c. 34 — 134

COVENANT *to ſtand ſeiſed.*

1. If a man, with intent to preſerve his eſtate in his name and blood, covenant to ſtand ſeiſed to the uſe of himſelf for life, and, after his deceaſe, to the uſe of *Edward* his firſt ſon for life, and the heirs male of ſuch firſt ſon, and in default of ſuch iſſue to the uſe of the ſecond ſon of *Edward*, and the heirs male of ſuch ſecond ſon, &c. and ſo ſeverally and reſpectively to all and ſingular the heirs male of the body of *Edward*—*Edward* takes only an eſtate for life — 7

COURTS.

See Admiralty. Inferior Courts. Bye Laws.

COURTS ECCLESIASTICAL.

1. A libel may be inſtituted in the ſpiritual court for calling a woman "*whore*" — — 25

2. A prohibition will not lie after ſentence in the ſpiritual court, if they have juriſdiction of the cauſe 25

3. A prohibition lies if the ſpiritual court refuſe a plea to the juriſdiction, or proceed in a libel for a legacy to be paid out of lands — 50

4. If a copy of *the articles* be denied by the court of arches, a prohibition lies as well as when the copy of *a libel* is denied — — 133

5. The archbiſhop of Canterbury may ſit as judge in the court of arches, and therefore he cannot ſue in the ſpiritual court for books bequeathed to the library of his palace at Lambeth, although he is only, in ſuch caſe, a truſtee — — 146

6. The ſpiritual courts are the king's courts — — 397

CUSTOM.

1. If a corporation be plaintiff in an action to try the validity of a cuſtom impoſing a toll on all goods imported coaſtwiſe, the freemen of the city may be examined as witneſſes for the defendants — — 146

2. If a freeman of *London* die inteſtate, the third part of his effects, given to his adminiſtrator by the cuſtom of that city, ſhall be diſtributed according to the ſtatute of diſtributions 175

3. The cuſtom of London, that the third part of the effects of an inteſtate freeman ſhall go to his adminiſtrator, is good, although an adminiſtrator was conſtituted by 31 Edw. 3. c. 11. and ſo within time of legal memory — — 176

4. If a freeman of London die inteſtate, leaving a wife and one child, the cuſtom is, that one part of his effects ſhall go to the wife, another to the child, and the third to the adminiſtrator — — 176, *notis.*

5. But now, by 1 Jac. 2. c. 17. ſ. 8. the adminiſtrator's third part ſhall be diſtributed according to 22 and 23 Car. 2. c. 10. — 176, *notis.*

DAMAGES.

1. *Qu.* Whether a verdict given for 100*l.* damages, and 6*d.* coſts, and judgment to recover his damages aforeſaid to 100*l.* and 10*l. de incremento*, be good — — 56

2. On a verdict for 100*l damages*, and 6*d.* coſts, a judgment entered, *quod recuperet damna ad centum libras, et pro incremento* 10*l.* without taking notice of 6*d. coſts*, ſeems bad 89

See COSTS *and* INQUIRY.

DEBT.

1. In debt againſt an executor, if a *devaſtavit* be returned, and there be judgment

judgment *de bonis propriis*, he may be held to ſpecial bail in an action on the judgment — — 56

2. A declaration in debt on a penal ſtatute, *quod cum*, &c. is bad 27

3. Pleadings in an action of debt on bond, given to the maſter and wardens of the company of *taylors*, in *Exeter*, not to exerciſe the ſaid trade in the ſaid city otherwiſe than as a journeyman — — 346

4. In debt for rent on a leaſe of *copyhold* and *freehold* lands, if the defendant plead "*eviction* from all the lands" in bar, and the plaintiff reply, that "another perſon was ſeiſed of the freehold," and traverſe the ſeiſin alledged in the plea, a *general verdict* for the plaintiff is good — 399

5. Debt for recuſancy — 179

6. Debt for non-conformity 238, 331

7. An action of debt will not lie by one *tenant in common* for his portion of the rent — — 446

8. Debt lies againſt an officer for refuſing to take the oaths — 475

DECLARATION.

1. If there be a fault in a declaration, on which the plaintiff muſt be nonſuited, and the defendant, taking notice of it, prepares no defence for the trial, and the plaintiff amends his declaration without a rule for ſo doing, and ſo ſurpriſes the defendant, and gets a verdict, the court will grant a new trial — — 155

2. On a *quantum meruit* brought by a ſurgeon for a cure, the court will not give leave to ſtrike ſo much out of the declaration, and the plaintiff to proceed for the reſt, at the peril of coſts — — 183

3. But the court will do it where the damages are certain, and the action in nature of a *debt* or *contract* 183

4. A declaration cannot be amended after iſſue joined — — 183

5. A declaration in trover, for "ſeven pieces of linen cloth," is bad; for *a piece* is not deſcriptive of a known quantity, and therefore it ſhould have added the number of *yards* they contained — — 433

6. Declaration in treſpaſs for taking ſeveral goods, and, as to ſome of them, no property laid in the plaintiff, *Qu.* whether on a general demurrer judgment can be given for that part which is well laid — 103

7. A declaration beginning in *covenant*, and ending in *caſe*, is bad 248

8. A declaration on a promiſe, in conſideration that the plaintiff would diſcharge a third perſon, is good, without ſhewing how the diſcharge was given — — 27, 28

9. A declaration in *aſſumpſit*, upon an *implied promiſe*, is good, although the words "*in conſideration thereof*," be omitted — — 180

10. A declaration in an action on the caſe, with a *quod cum*, is ſufficiently direct and poſitive, but not in an action of treſpaſs *vi et armis* 180

11. Same point — — 181

12. Same point — — 295

13. Same point — — 448

14. A declaration on a bill of exchange, againſt *the drawer*, muſt ſtate that it was *tendered* to *the acceptor*, and that he refuſed to accept it

DEER-STEALING.

1. An indictment for breaking and entering a park, and for hunting and killing fallow deer, concluding *contra formam ſtatuti*, is good, although the ſtatute mentions only hunting and killing the deer, but ſays nothing as to breaking the park 459

2. A record returned by *certiorari*, of a conviction on the ſtatute 13 Car. 2. c. 10. for hunting deer in a park 489

3. A conviction on 13 Car. 2. c. 10. for *hunting* deer, is good, although it alſo ſtate that the park was *broke* 490

4. On a conviction for hunting deer, ſtating

ſtating that A. hunted deer, and broke the park, *without conſent of the owner*, thoſe words ſhall apply to the *hunting* as well as to *the breaking* 450

5. By 13 Car. 2. c. 1. *every perſon* who is out on the purſuit, when a deer is unlawfully hunted, is liable to the penalty — — 450

DEFENCE.

1. The words "*venit et defendit vim* "*et injuriam quando, &c.*" make a *full defence*; and after ſuch defence a defendant cannot plead *outlawry* in diſability of the plaintiff, although a *ſpecial imparlance* has been given to him — — 444

2. In debt upon an eſcape after execution, the defendant appeared. *et defendit vim et injuriam quando, &c.* the court held this was not a full defence 445, *notis.*

3. But ſee Trundal v. Trowell, *contra* 445, *notis.*

4. In all dilatory pleas, except ſuch as go to the juriſdiction of the court, a *full defence* muſt be made 445, *notis.*

DEMAND.

1. In an action on a note of hand, made payable "three months after "the plaintiff ſhall demand the "ſame," a demand in writing, left by the plaintiff's attorney at the houſe of the defendant, is not ſufficient; for the demand ought to be perſonal — — 235

DEMURRER.

1. A *demurrer* will lie to a challenge of *the array*, or *an iſſue* may be taken on the fact alledged — 422

DEVASTAVIT.

1. On a ſpecial iſſue, the defendant cannot plead *non deveſtavit ad valor.* as the plaintiff has alledged, without ſaying *nec aliquam inde paravit*; for if part were waſted, the plaintiff ſhall recover ſo much, as well as on a plea of *plene adminiſtravit*, if aſſets be found to part of the debt — 447

2. It is no *deveſtavit* in an executor to pay a debt on *ſimple contract*, before a *bond debt*, of which he had no notice 492, *notis.*

DEVISE.

1. If a teſtator deviſe "all his lands "to A. and B. his two daughters, "and their heirs, equally to be di-"vided betwixt them, and if they "die without iſſue, then to his ne-"phew, and the heirs male of his "body," the daughters have ſeveral eſtates tail by moieties; but on the death of one of them without iſſue, her moiety ſhall not go immediately to the nephew, but ſhall remain with the ſurviving daughter by way of croſs remainder — 136

2. A. having *a ſon* and *a grandſon*, both of the name of *Robert*, deviſes lands "to his ſon *Robert*, and his heirs;" *Robert* the ſon dies in the life-time of the teſtator. The teſtator afterwards republiſhed his will, and, *animo teſtandi*, declared that *Robert* his *grandſon* ſhould have the lands which were given by the will to *Robert* his *ſon*. THE GRANDSON cannot take the lands thus deviſed, for by the death of *the ſon* the deviſe to him was void, and therefore could not be revived to the *grandſon* by the *parol declaration* of the teſtator — 64

3. A man having lands of £. 10 a year in poſſeſſion, and of £. 30 a year in reverſion, expectant on an eſtate for life, bequeaths £. 180 in different legacies, to be paid out of his lands within two years after his deceaſe, and deviſes his lands generally, without any limitation of eſtate, to his nephew.—THE NEPHEW takes an eſtate *in fee*, not *on condition* that he pays the legacies within the two years, but *in truſt* to pay them - 37

4. If a teſtator deviſe thus: "I deviſe "my lands to my wife for life, and "after

" after her death the ſame ſhall re-
" main to my iſſue;" and it appear that he had two ſons and two daughters, the remainder is void for its uncertainty — 37, *notis.*

5. If a teſtator be ſeiſed of divers lands in three different places, and the lands in one of the places are lands mortgaged to him and forfeited, a deviſe of " all his goods, " chattels, leaſes, eſtates, mortgages, " debts, &c." will not paſs *a fee* in the mortgaged premiſſes 37, *notis.*

6. A deviſe to A. conditionally, that he ſhall allow to the ſon of the teſtator " meat, drink, apparel, waſh-
" ing, and lodging, during his na-
" tural life," conveys to A. an eſtate in fee — — 49

7. A deviſe of " all other my eſtate, " of what nature ſoever, to my wife " *Joan*, whom I make my execu-
" tor, to pay my debts and legacies " therewith," paſſes the inheritance 396

8. On a deviſe " to A. for life, with " remainder to her ſons ſucceſſively, " and the heirs male of their bo-
" dies," with a MEMORANDUM indorſed on the will, " that the ſaid " A. ſhall not alien the ſaid lands " from the heirs male of her body, " but that upon default of ſuch iſ-
" ſue it ſhall remain to B. in fee." —A. ſhall have an *eſtate for life* only, and not an *eſtate in tail* by implication; for the *memorandum* explains the intention of the teſtator - 405

9. On a deviſe " to my wife for life, " if ſhe do not marry, and if ſhe do " marry, then to my ſon and the " heirs of his body," the remainder is not contingent, but veſts in the ſon to take effect in *poſſeſſion* upon the *death* or *marriage* of his mother 153

10. If a deviſe be made to a widow for life, provided ſhe do not marry, it ſhall be conſidered merely *in terrorem*, except there be a deviſe over *immediately* — 153, *notis.*

11. Therefore, under a deviſe " to a " wife for life, provided ſhe remain " a widow, but in caſe ſhe marries " a ſecond huſband, then to J. S. " *when* he ſhall attain his age of " twenty-three years," the wife ſhall take an abſolute eſtate until J. S. is twenty-three years of age, although ſhe marry before — 153, *notis.*

DELAPIDATIONS.

1. A ſuit lies in the ſpiritual court for delapidations ſuffered before a general pardon, for the pardon does not diſcharge the ſuit for the civil injury — — 421

DISTRESS.

1. The tools of a cooper, and the utenſils in trade of any other trader or mechanic, may be diſtrained for non-payment of the poors rate; for the 43 Eliz. c. 2. having directed goods diſtrained for non-payment of the poors rate to be *ſold*, the protection which utenſils in trade were under by the common law, where goods ſo taken could only be kept as *a pledge*, is removed - 127

2. *Beaſts of the plough* may be diſtrained for non-payment of the poors rate 127, *notis.*

3. *Wearing apparel*, or any other of the articles which were protected from diſtreſs by the common law, may be diſtrained for rent in arrear; becauſe the ſtatute 2 Will. & Mary, c. 5. has given the diſtrainer power *to ſell* them — — 127, *notis.*

4. But if *beaſts of the plough*, or *utenſils in trade*, be in actual uſe, they cannot, while ſo in uſe, be diſtrained 127, *notis.*

5. And ſuch articles ought not to be diſtrained, if there are other articles of ſufficient value on the premiſſes 127, *notis.*

DISTRIBUTION.

1. The third part of the effects of an inteſtate freeman, given by the cuſ-

tom of London to his adminiſtrators, ſhall now be divided according to the ſtatute of diſtributions — 175

2. If a ſon die inteſtate in the life-time of his father, and the father renounces, and adminiſtration is granted to a brother of the inteſtate, *quære*, whether his ſiſter ſhall have diſtribution — — — 285

3. Diſtribution under 22 & 23 Car. 2. c. 10. ſhall only extend to brothers and ſiſters children of the inteſtate 286

4. If a man die inteſtate, leaving no wife and only one child, who obtains letters of adminiſtration to his father, and then dies inteſtate, under age, and letters of adminiſtration *de bonis non* of the father are granted to the next of kin to the ſon, the court will not prohibit the commons from revoking their letters, and granting ſuch adminiſtration to the next of kin to the father — 408

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1. *Sir Thomas Twiſden*, Judge of the King's Bench, is diſcharged, not from his office, but from his attendance on the duties of it, by reaſon of his age and infirmity, and is allowed a penſion from the crown — 30 *notis.*

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3. If, in an action of account, an iſſue be joined on *plene computavit*, and the *jurata* and *diſtringas* be "*de placito debiti*," it is a fatal variance 395
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5. If a juror be called "*Berryman*" in the *diſtringas*, and "*Ferryman*," in *pannel*, the variance is fatal 2
6. A variance between the *original writ* and the *declaration*, in ſtating the value of the property, is aided by the ſtatute of jeofails — 304

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1. The vendee of a term under a *venditioni exponas*, muſt bring an ejectment to obtain the poſſeſſion, for it cannot be delivered to him by the ſheriff — — 86
2. If, on a *venditioni exponas*, the ſheriff values the goods too high, he ſhall take them himſelf; but he may return, that the goods remain in his hands *pro defectu emptorum* 87

VENDOR.

1. If a factor ſell the goods of his principal, and receive a draft from the vendee on his banker, for the value of them, and accept from the banker notes of hand in diſcharge of ſuch draft, the principal cannot recover the value of the goods from the vendee, although the banker fail before the notes become due — 296

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1. A *venire facias* in an action brought in an inferior court, directed to the ſerjeant at mace, is good, although it do not ſtyle him "officer of the court," if the ſame man and ſame officer

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2. A *venire*, though it ſtates the jury to be *honeſt* men of 20*l.* a year, inſtead of *free* men of 4*l.* a year, according to 27 Eliz. c. 6. is good 144

3. If a *ſuperſedeas* be granted to an *audita querela*, upon the proceſs of *venire facias* before bail found, it is irregular — — 239

4. After *venire* returned, and jury ſummoned, if the parties agree, and do not countermand the ſummons, the jurymen who appear ſhall have their uſual charges — — 248

5. If one of the ſheriffs of *London* bring an action againſt the chamberlain, the fact may be ſurmiſed on the roll, and the proceſs of *venire facias* directed to, and returned by the co-ſheriff — — 286

6. If a ſheriff die, and his ſucceſſor be challengeable, a ſuggeſtion may be entered, and the *venire* directed to the coroner — — 288

7. If a ſheriff, being co-defendant, return the *venire*, it is cauſe of challenge, though he did not plead until after the award of the writ 288

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1. A *venue* may be laid in *a foreſt*, although it extend to ſeveral vills, as "in the foreſt of *Dean*, in the county "aforeſaid" — — 147

2. If a declaration in *aſſumpſit* in an inferior court ſtate the promiſe to have been made at the town, and in the county of *Southampton*, a *venue* laid in the town of *Southampton*, without ſtating it to be in the county, is good — — 180

3. In dower, on the iſſue of infancy, the *venue* muſt be laid where the land lies — — 163

4. A *venue* muſt be laid in a declaration in prohibition — 145

5. The changing a *venue* is *ex gratia curiæ*, and not *ex debito juſticiæ* 177

6. A barriſter has the privilege to lay his *venue* in *Middleſex* in all tranſitory actions — — 177

7. Same point — — 242

8. The court will change the *venue* in an action of conſpiracy, if it appear that the plaintiff's intereſt with the ſheriffs of the county in which it is laid is ſo powerful that an impartial trial is not likely to be had 198

9. If a ſtatute require a thing to be done in *England*, the *venue* may be laid in *any county* in the kingdom 247

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11. The court will not change the *venue*, in an action of *ſcandalum magnatum*, on the common affidavit 303

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1. The court will grant a new trial if a verdict be obtained by ſurprize 155

2. *Qu.* Whether a verdict given for 100*l.* damages and 6*d.* coſts, and judgment to recover his damages aforeſaid to 100*l.* and 10*l.* *de incremento*, be good — — 56

3. On an iſſue that the freemen and inhabitants of ancient meſſuages have, by cuſtom, a right of common for ſo many beaſts, a verdict finding a right of common *modo et forma*, and alſo that the freemen had a right of common for an additional number, is good; for the latter finding ſhall be rejected as ſurpluſage — — 78

4. On a verdict for 100*l.* damages, and 6*d.* coſts, a judgment entered, *quod recuperet damna ſua ad centum libras, et pro incremento*, 10*l.* without taking

ing notice of the 6*d.* coſts, is bad 89

5. In an action on the caſe, if a verdict be for 400*l.* judgment for 300*l.* is good, although no *eat ſine die* be entered — — 93

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8. In debt for rent on a leaſe of *copyhold* and *freehold* lands, if the defendant plead *eviction* from all the lands in bar, and the plaintiff reply that another perſon was ſeiſed of the freehold, and traverſe the ſeiſin alledged in the plea, a *general verdict* for the plaintiff is good — 399

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2. And it is not neceſſary that the writ ſhould be returned — 79

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1. If lands be ſettled to *the uſe* of A. and B. for their lives, remainder to the uſe of the firſt ſon of B. in tail male, remainder to the heirs of A. A RELEASE made by B. of all his right and eſtate to A. and his heirs, does not deſtroy the contingent remainder to the firſt ſon of B. although the releaſe be made before ſuch ſon is born — 91

2. If tenant in tail *diſcontinue* the eſtate by making a grant for life not warranted by the ſtatute 32 Hen. 8. c. 28. and die without iſſue, A SURRENDER made by the tenant for life to the remainder man in tail, will not purge the *diſcontinuance*, and therefore he cannot bar his iſſue in tail by ſuffering a common recovery with ſingle voucher — — 243

3. If a man, with intent to preſerve his eſtate in his name and blood, covenant to ſtand ſeiſed to the uſe of himſelf for life, and after his deceaſe to the uſe of *Edward* his firſt ſon for life, and the heirs male of ſuch firſt ſon, and in default of ſuch iſſue to the uſe of the ſecond ſon of *Edward*, and the heirs male of ſuch ſecond ſon, and ſo ſeverally and reſpectively to all and ſingular the heirs male of the heirs male of the body of *Edward*, *Edward* takes only an eſtate for life 7

4. No uſes ſhall be executed by 27 Hen. 8. c. 10. which are limited contrary to the common law 13

5. A *demiſe and grant* adjudged to amount to a *bargain and ſale* within the ſtatute of uſes — 14

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1. To debt on bond, A PLEA that it was corruptly agreed to pay more than legal intereſt, is bad, unleſs it ſpecially ſtate the *corrupt agreement*, and the amount of the *uſurious intereſt* 330

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3. If a ſhip be loſt, wages ſhall be paid in

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1. If the principal give a warrant of attorney to appear for *himſelf* and *his bail*, judgment may be ſigned againſt the bail for want of appearance 161

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2. See alſo Beningſage, v. Ralphſon 250

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1. A declaration in an action of waſte, that the defendant ploughed up the land which was paſture, "*et ſic facit vaſtum*," is bad for uncertainty, even after verdict — — 8

WATERCOURSE.

1. An *information* lies for cutting down the banks of a public river, and thereby diverting the courſe of the water, although that part of it is by act of parliament veſted in private perſons, and *an action* given them for damages done to it — 30

2. A declaration in an action on the caſe, for diverting a watercourſe running to the plaintiff's mill, with only a *debet et ſolet currere*, is good, without ſtating that it was an *ancient mill*, for being againſt *a wrong doer*, poſſeſſion is ſufficient — 243

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2. The birth of a child is a virtual revocation of a will of perſonal property 242

3. A will, deviſing real eſtate, may be virtually revoked, by the ſame alteration in the circumſtances of the teſtator's family as will revoke a will diſpoſing of perſonal property 242, *notis.*

4. But it ſeems to be ſettled, that the alteration preſumed from a ſubſequent *marriage*, and the *birth of a child*, are the only circumſtances ſufficient for this purpoſe 242, *notis.*

5. For *marriage* alone, nor even *marriage* and the birth of *children*, who die

die in the life-time of the teſtator, are not ſufficient 242, *notis.*

6. It has however been determined, that a *ſubſequent marriage*, and the birth of a *poſthumous child*, the wife of the teſtator being *groſſement enceint* at the time of his death, is an implied revocation of a will 242, *notis.*

7. And *marriage* alone is a revocation of the will of a *feme ſole* 242, *notis.*

8. A will made by a freeman of *London* may be proved and inrolled in THE HUSTINGS of that city 249

9. A. having *a ſon* and *a grandſon* both of the name of *Robert*, deviſes land to his ſon *Robert* and his heirs; *Robert* the ſon dies in the life-time of the teſtator; the teſtator afterwards republiſhed his will, and *animo teſtandi* declared, that *Robert* his *grandſon* ſhould have the land which was given to *Robert* his *ſon*: this *parol* declaration will not *renew* the will ſo as to enable the *grandſon* to take the lands deviſed to *the ſon* 64

10. The ordinary is the proper judge of the age at which a perſon may make a will — — 204

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2. On an indictment for not repairing a bridge, which the defendant is bound to repair *ratione tenuræ*, the inhabitants of the county may be witneſſes — — 47

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5. A copy of depoſitions returned into Chancery, taken under a commiſſion to examine witneſſes, are not admiſſible evidence on an indictment for perjury againſt the deponent, although ſworn to be a true copy, unleſs it be firſt proved that the deponent was ſworn, and that he made the original depoſitions 486

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2. The words "*whore*" and "*old whore*," are of ſpiritual cognizance 25

3. To ſay "Thou art a regrater, and did regrate by ſelling at 12*s.* when you bought at 10*s.*" is not actionable — — 32

4. An action for ſaying, "You are forſworn in your anſwer," is good, without alledging that the cauſe was within the juriſdiction of the court in which the anſwer was 33

5. Slander laid to be ſpoken of one A. B. *innuendo* the plaintiff, is not ſufficient, without averring that A. B. was the perſon ſpoken of 59

6. To ſay "He killed a man aboard of a ſhip, and if he had not bought it off for a piece of money he had ſuffered for it," is actionable, for it ſhall be taken that the *killing* imputed

puted to him was a *felonious killing*, as otherwiſe he could not ſuffer for it 78

7. To ſay to an *heir*, that he has none of *the blood* of his anceſtors, is not actionable, for it does not import *baſtardy* — — 95

8. It is actionable to ſay of a juſtice of the peace and deputy lieutenant of a county "He is *a papiſt* and a penſioner" — — 140

9. To ſay of one who is a juſtice, a deputy lieutenant, and a candidate for a ſeat in parliament, "*He* is a *Jacobite*, and for bringing in the prince of Wales and popery, to the deſtruction of the nation," is actionable — — 140, *notis.*

10. To ſay of a trader "*He is a bankrupt*," is actionable, although no ſpecial damage accrue — 153

11. To ſay "The laſt grand jury that preſented me are damned perjured rogues," is an indictable offence 209

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25. The words "She is *B. Harden's* common whore," are **not** in themſelves actionable, and therefore muſt be laid *per quod*, &c. but it is not ſufficient to lay the ſpecial damage by a general allegation, viz. "by which words ſeveral that courted her in marriage did forbear, &c." 482

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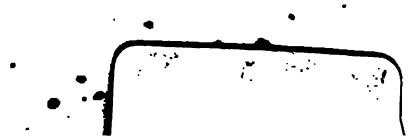
ERRATA et ADDENDA.

Page 1, in margin, *after* 1 Hawk. P. C. ch. 69. ſ. 10. *read* 4 Burr. 2499.
28, in margin, *inſtead* of "foundrous *read* ſtopped up."
60, notes, *after* "1 Shower" *read* "page 309."
60, notes, *after* "4 Term. Rep. 521," *read* "ſee alſo 4 Hawk. P. C. 7 edit. ch. 27."
81, in margin, line 10, *dele* "for."
81, *e* in margin, line 7. *inſtead* of "is" *read* "be."
92, caſe 84, line 1, *inſtead* of "*Eow*" *read* "*Edw.*"
134, note *(b) after* "Cro. Car." *read* "page 188."
152, note *(i) read* "Trotter *v.* Blake, 2 Mod. 122."
167, caſe 158, *after* "31 Eliz." *read* "c. 6."
201, laſt line, *inſtead* of "Burr" *read* "3 Burr. 1897."
238, note *(c) read* "12 Co. 120."
252, caſe 253 margin, *read* "the court *on.*"
275, note *(c) read* "5 Co. 62."
275, note *(k) read* "8 Co. 31."
333, note *(g) read* "Pennant's Caſe, 3 Co. 64."
415, margin, *inſtead* of "remain" *read* "remove."
504, caſe 455, margin, *dele* "Ante, caſe 462."